Calendar No. 716

97TH CONGRESS
2d Session

SENATE

REPORT No.
97-502

UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

REPORT

OF THE

COMMITTEE ON ARMED SERVICES
UNITED STATES SENATE

[To accompany S. 1814]

together with

ADDITIONAL VIEWS

ON

AMENDING TITLE 10, UNITED STATES CODE, TO REQUIRE THE SECRETARY CONCERNED TO COMPLY WITH THE TERMS OF CERTAIN COURT ORDERS IN CONNECTION WITH THE DIVORCE, DISSOLUTION, ANNULMENT, OR LEGAL SEPARATION OF A MEMBER OR FORMER MEMBER OF A UNIFORMED SERVICE AND WHICH AFFECT THE RETIRED OR RETAINER PAY OF SUCH A MEMBER OR FORMER MEMBER, AND FOR OTHER PURPOSES

JULY 22 (legislative day JULY 12), 1982—Ordered to be printed

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U.S. GOVERNMENT PRINTING OFFICE

96-443 O

WASHINGTON : 1982

S203-6

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REPORT
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UNIFORMED SERVICES FORMER SPOUSES PROTECTION ACT

JULY 22 (legislative day, JULY 12), 1982.—Ordered to be printed

Mr. JEPSEN, from the Committee on Armed Services, submitted the following

REPORT

[To accompany S. 1814]

The Committee on Armed Services, to which was referred the bill (S. 1814) to amend title 10, United States Code, to require the Secretary concerned to comply with the terms of certain court orders in connection with the divorce, dissolution, annulment, or legal separation of a member or former member of a uniformed service and which affect the retired or retainer pay of such a member or former member, and for other purposes, reports favorably thereon with an amendment in the nature of a substitute to the text of the bill and recommends that the bill as amended do pass.

COMMITTEE AMENDMENT IN THE FORM OF A SUBSTITUTE

The committee amended the bill by striking out all after the enacting clause and substituting a new bill reflecting changes as recommended by the Committee on Armed Services.

PURPOSE OF THE BILL

The primary purpose of the bill is to remove the effect of the United States Supreme Court decision in *McCarty* v. *McCarty,* 453 U.S. 210 (1981). The bill would accomplish this objective by permitting Federal, State, and certain other courts, consistent with the appropriate laws, to once again consider military retired pay when fixing the property rights between the parties to a divorce, dissolution, annulment or legal separation. These courts may now apply such laws to the retired pay of Federal civil servants, Foreign Service personnel and private sector employees.

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Background and Discussion

Currently, eight States—Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, and Washington—apply community property principles. The concept of the pool of property available for division on divorce or other dissolution of a marriage (i.e., marital property) in these States is based on French and Spanish Civil Law, rather than on the English common law from which other State marital property laws are derived. In community property States, all property earned by either spouse during the marriage is considered "community property" in which each spouse has a one-half interest. The general rule is that a pension earned by one party for work performed during the marriage becomes part of the marital property in which each spouse has an interest.

Forty other States and the District of Columbia apply common law principles to the determination and distribution of marital property. An increasing number of these States are now determining that retirement and pension benefits can be deemed part of the marital property in divorce. However, in these juridictions, the concept of an equal interest created by law in marital property does not exist. These States apply a concept known as "equitable distribution" in dividing marital property. Under this approach, the court weighs the equities of each case and divides the property accordingly, not necessarily on a 50/50 basis, but however seems fair under all of the circumstances. Courts in five of the eight community property States also have the discretion to distribute marital property on this basis.

The two remaining States—Mississippi and West Virginia—are presently the only strict "title" States, in which title controls the distribution of marital assets. Upon divorce, pensions in these States remain the property of those who earn them.

In the vast majority of divorce cases, domestic relations courts do not become involved in the financial aspects of divorce. Usually, a privately negotiated property settlement is entered into by the parties and incorporated in the divorce decree. For this reason, there is little information available on the precise extent to which military retired pay has been considered and divided during the divorce process. What information exists, however, indicates that pensions are seldom divided between the parties to a divorce. Instead, the pensioner generally retains current or future annuity benefits and the non-working spouse receives an offsetting award of cash or other property.

However, there is a growing body of State laws and precedents in the area of dividing pensions and retired pay. As of June 26, 1981, case decisions in virtually all community property States, and a number of common law property States employing equitable distribution principles, specifically permitted military retired pay to be considered as an asset of the marriage and subject to division. At least six other States had specifically ruled that military retired pay could not be so considered.

The McCarty *v.* McCarty Decision

On June 26, 1981, the United States Supreme Court decided the case of *McCarty* v. *McCarty,* 453 U.S. 210 (1981), holding that

absent a Federal statute permitting such action, a State court may not order a division of non-disability military retired pay as part of a distribution of community property incident to a divorce proceeding. The Supreme Court examined the military retirement scheme and concluded that the application of State community property laws conflicted with that scheme. According to the Court, the Congress intended military retired pay to be the personal entitlement of the retiree. Thus, the Court reasoned that the application of State community property laws " 'interfere(s) directly with a legitimate exercise of the power of the Federal Government' " reflected in the military retirement scheme. However, the Court left it to the Congress to change the policy reflected by that scheme. Writing for the majority, Justice Blackmun stated:

> We recognize that the plight of an ex-spouse of a retired service member is often a serious one . . . Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs. 453 U.S. at 235–236.

Prior Legislation Similar to S. 1814

Until 1975, the Federal Government had refrained from involvement in the circumstances surrounding the divorce of a present or former Government employee or military member. However, in 1975, Public Law 93–647 authorized the Federal Government to recognize a valid State court order garnishing or attaching the salary or retired pay of a present or former military member or Government employee when the individual failed to keep up with alimony or child support payments required by a court ordered divorce settlement. *See* 42 U.S.C. § 659. The 95th Congress passed Public Law 95–30 which limited the amount of salary or retired pay that can be garnished or attached. A present or former military member or Government employee who is supporting a spouse or dependent can have up to 55 percent of disposable earnings garnished or attached; a person without a spouse or dependents can have up to 65 percent of disposable earnings attached. *See* 15 U.S.C. § 1673(b); 5 CFR Part 581 (1982).

In 1978, the 96th Congress enacted a separate law, 5 U.S.C. § 8354(j), which is applicable to the retired pay of Federal civil service employees. This law requires the Office of Personnel Management to comply with the terms of a court decree, order, or property settlement in connection with a divorce, annulment or legal separation of a Federal employee. No limitation was imposed on the percentage of retired pay that could be paid out pursuant to such decrees and orders. This law does not apply to military personnel.

Finally, the Foreign Service Act of 1980 (Public Law 96–405) entitles the former spouse of a Foreign Service employee to receive up to 50 percent of the employee's retired pay, provided that the former spouse was married for at least 10 years of the employee's Foreign Service career. *See* 22 U.S.C. §§ 4044 *et seq.* This right can

be modified by spousal agreement or certain court orders. The rationale for this entitlement legislation was that the majority of Foreign Service duty is overseas and the "Foreign Service tradition of husband-wife 'teams' and the participation of wives in the vital representational activities is still very much alive."

PROVISIONS OF S. 1814

On November 4, 1981, Senator Roger Jepsen introduced S. 1814, the Uniformed Services Former Spouses Protection Act. Under S. 1814 military retired pay can be treated either as the property solely of the member or as the property of the member and his spouse. No right or entitlement to military retired pay is created by S. 1814. The bill does not require any division of retired pay by a State court; nor does it prohibit such division. Treatment of such retired pay—with certain limitations—generally would be dependent on the divorce and property laws applied by the courts of the jurisdiction in which a divorce or other related decree is issued.

S. 1814 imposes three distinct limits on the division or enforcement of court orders against military retired pay in divorce cases. First, the total amount of the disposable retired or retainer pay of a member which the Service Secretary could pay out to satisfy a court order for prospective obligations could not exceed 50 percent of such pay. Second, this bill would not create in the spouse or former spouse any right, title or interest which could be sold, assigned, transferred or disposed of by will or inheritance. Third, the courts could not direct that a service member retire at a particular time in order to effectuate any payment out of retired pay to a spouse or former spouse. Within these limitations, a former member's military retired pay would be subject to court orders issued incident to a divorce, dissolution, annulment or legal separation proceeding. The Service Secretaries would comply with such orders which direct the payment of a portion of that retired pay to a former spouse as alimony, as child support, or as the distribution of marital property.

S. 1814 extends limited health care coverage to certain unremarried former spouses of present or former service members. To qualify for the coverage, the former spouse must have been married to the member or former member for a period of at least 20 years on or before the date of the divorce during which period the member completed at least 20 years of creditable service. The health care is offered for a period of 180 days immediately following the date of the final decree of divorce, dissolution or annulment, provided that the former spouse remains unremarried. Under certain circumstances, health care will be extended by the Secretary concerned for the treatment of a medical condition which existed prior to the end of the 180-day period, but only if treatment for that condition has been provided by the uniformed services prior to the end of that period.

Finally, S. 1814 provides future participants in the Survivor Benefit Plan (SBP) the flexibility to provide for their former spouses. The bill provides that where the service member has not remarried and does not have a dependent child for whom an annuity can be provided under SBP, the member could voluntarily provide an annuity to a former spouse. If the member chooses to pro-

vide such an annuity and then remarries, the member would be free to change the earlier designation so as to provide an annuity to the new wife or dependent child, unless the member had made a commitment as part of a voluntary written agreement to designate the former spouse. In that event, the member would have to obtain the appropriate court or other approval before changing the designation. It is the committee's intention that the service member retain the sole right to elect a former spouse as beneficiary of any SBP annuity.

The provisions of S. 1814 reversing the effect of the *McCarty* decision are retroactive to June 26, 1981, the date on which the U.S. Supreme Court issued that decision. That is, the committee intends the legislation to restore the law to what it was when the courts were permitted to apply State divorce laws to military retired pay. Former spouses divorced in the interim period between the *McCarty* decision and the effective date of this law will have the opportunity to return to court to have their decrees modified in light of this legislation. However, nothing in the bill would mandate payments out of retired pay which had been disbursed during the period between the date of the *McCarty* decision and the effective date of this legislation. The mechanism for direct payment of court orders for alimony, child support and property distribution would apply only to payments of retired pay for periods beginning on or after the effective date of this legislation.

COMMITTEE CONSIDERATION

The Subcommittee on Manpower and Personnel of the Committee on Armed Services held four hearings (September 22, 1981; February 19, 1982; March 10, 1982; and April 29, 1982) on S. 1814 and similar legislation. The following individuals provided oral or written testimony on that legislation:

The Honorable Dennis DeConcini, United States Senator from Arizona.

The Honorable Jeremiah Denton, United States Senator from Alabama.

The Honorable Pete V. Domenici, United States Senator from New Mexico.

The Honorable Mark Hatfield, United States Senator from Oregon.

The Honorable Kent Hance, United States Representative from Texas (19th District).

The Honorable Patricia Schroeder, United States Representative from Colorado (1st District).

The Honorable G. William Whitehurst, United States Representative from Virginia (2nd District).

The Honorable Lawrence J. Korb, Assistant Secretary of Defense (Manpower, Reserve Affairs and Logistics).

Lt. Gen. R. Dean Tice, USA, Deputy Assistant Secretary of Defense for Military Personnel and Force Management.

Major Gen. William L. Webb, Jr., USA, Assistant Deputy Chief of Staff for Personnel.

VAdm. Lando W. Zech, Jr., USN, Deputy Chief of Naval Operations (Manpower, Personnel and Training).

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Lt. Gen. Edward J. Bronars, USMC, Deputy Chief of Staff for Manpower.

Lt. Gen. Andrew P. Iosue, USAF, Deputy Chief of Staff for Manpower and Personnel.

Stanford E. Lerch, Chairman, Section of Family Law, American Bar Association.

Robert D. Arenstein, Chairman, Committee on Interstate and Federal Support Laws and Procedures, Section of Family Law, American Bar Association.

Michael E. Barber, Council Member, Section of Family Law, American Bar Association.

Rosemary Locke, Legislative Chairman, National Military Wives Association.

Suzanne Davis, Chairman, Divorce Study Group, National Military Wives Association.

Nancy Abell, President, Ex-Partners of Servicemen for Equality.

Captain Henry Palau, JAGC, USN Retired, Deputy Director for Legislative Affairs, The Retired Officers Association.

Sgt. Major C. A. McKinney, USMC, Retired, Senior Vice President for Government Affairs, The Non-Commissioned Officers Association.

John P. Sheffey, Executive Vice President, National Association for Uniformed Services.

Donald L. Harlow, Executive Director, Air Force Sergeants Association.

Tish Sommers, President, Older Women's League.

Donna Reed Wickstrand, American Association of University Women.

Carol Burroughs Grossman, National President, Women's Equity Action League.

The Military Spouse

The committee received extensive testimony from the uniformed services and public witnesses on the contributions and sacrifices made by the military spouse throughout the service member's career. A recurrent recruiting point that is made to a military couple from the time of the spouse's initial entry into the military is that the spouse is a partner in the member's career. The theme of the "military family" and its importance to military life is widespread and well publicized. Military spouses are still expected to fulfill an important role in the social life and welfare of the military community. Child care and management of the family household are many times solely the spouse's responsibility. The military spouse lends a cohesiveness to the family facing the rigors of military life, including protracted and stressful separations. The committee finds that frequent change-of-station moves and the special pressures placed on the military spouse as a homemaker make it extremely difficult to pursue a career affording economic security, job skills and pension protection. Therefore, the committee believes that the unique status of the military spouse and that spouse's great contribution to our defense require that the status of the military spouse be acknowledged, supported and protected.

Impact on Retention and Recruiting

Witnesses representing the Office of the Secretary of Defense and four uniformed services testified to the significant sacrifices and contributions made by military spouses. All agreed that some form of remedial legislation which is fair and equitable to both spouses was necessary to provide a solution to the *McCarty* decision.

On March 10, 1982, Dr. Lawrence J. Korb, Assistant Secretary of Defense for Manpower, Reserve Affairs and Logistics, testified that "the Department of Defense has always considered domestic relations matters to be primarily governed by State law, through State courts." Thus, the Department's position is that the limitations of the *McCarty* decision should be overruled. However, the Department advocated that the powers of the State courts to divide military retired pay should be subject to certain limitations necessary to protect the personnel management requirements of the military services.

Representatives for the Army, Navy, Air Force and Marine Corps testified on April 29, 1982, in support of an equitable solution to the problems created by the *McCarty* decision. However, they contended that enactment of legislation which permits military retired pay to be treated as property in divorce proceedings could adversely affect future military recruiting and retention, and pose military personnel assignment problems.

The committee notes that until June 26, 1981, a number of State courts traditionally recognized that military retired pay could be dealt with as marital property and divided between the parties. But the committee believed it was necessary to evaluate fully the concerns generated by the Defense Department and military services relative to force management. To that end, the committee requested the Department of Defense to furnish objective data, the results of statistically sound surveys, or any other pertinent information which indicated that prior to the *McCarty* decision military personnel management needs were adversely affected by application of State property laws and precedents to military retired pay. The committee also requested similar information on the potential for future management problems if S. 1814 were enacted into law.

The Department of Defense has not submitted any satisfactory empirical evidence based on reasonable or realistic assumptions concerning divorce proceedings in the State courts to show that during the period prior to the *McCarty* decision, recruiting, retention and personnel assignment were adversely affected by application of State property laws to military retired pay. Nor has the Department undertaken any surveys to ascertain the percentage of divorced military service members whose interests in retired pay were affected by State law and the extent to which career decisions were altered as a result of any division. Thus, in the committee's view, the Department has not established a data base from which to make projections on the potential impact of S. 1814 on military manpower management.

Further, three of the four military services have not provided any empirical evidence that division of military retired pay in divorce cases has or would adversely affect recruiting and retention.

One service did conduct a survey which asked that all service members questioned assume that they would have their retired pay divided upon divorce and then measured the impact on retention. The committee does not believe that this assumption reflects what occurs in all divorce cases. Indeed, a recently conducted study—reviewing California divorce cases disposed of prior to the *McCarty* decision—concluded almost just the opposite.[1] California is a community property State with a pure no-fault divorce law. Data from approximately 2,000 court records, in-depth interviews with 44 family law judges, 169 matrimonial attorneys, 114 recently-divorced men and 114 recently-divorced women were compiled and analyzed. The study considered the economic aspects of divorce, including the patterns of property, spousal and child support awards. It also analyzed the ways in which divorce settlements have shaped radically different futures for divorced men on the one hand, and for divorced women and their children on the other. Among other things, the study concluded that "pensions are typically awarded to the worker, with an offsetting monetary award to the other spouse. Male and female workers are equally likely to be awarded their own pensions in a divorce settlement. However, since men are more likely than women to hold jobs that allow them to acquire pensions, they are also more likely to be awarded those pensions at divorce." [2]

Based on these considerations and the record developed in the hearings, the committee believes that returning to the State courts—with certain limitations—the discretion to deal with military retired pay in divorce cases is a sound prescription for the admitted problems created by the *McCarty* decision. The committee cannot conclude that this approach would be so detrimental to military manpower management as to warrant retaining the fundamental result of the *McCarty* decision—that the courts are barred from considering military retired pay in dividing property in a divorce case.

Forum Shopping

Department of Defense witnesses suggested changes to the bill to protect against the possibility of "forum shopping" by spouses or members. The term "forum shopping" in this context implies a search for the State jurisdiction with the most advantageous law and procedures in which to commence a divorce proceeding. The most favorable jurisdiction might be a State with which the spouse or member has had little previous contact.

The committee carefully considered the need to restrict the benefits afforded by the bill to protect against forum shopping. However, the committee concluded that existing procedural and substantive protections afford both parties ample opportunity to guard against potential jurisdictional abuses inherent in allegations of forum shopping.

Active duty service members are afforded some procedural protections against forum shopping by the Soldiers' and Sailors' Civil

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[1] Lenore J. Weitzman, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards," 28 UCLA Law Rev. 1181-1268 (1981).

[2] *Id.* at 1209.

Relief Act ("SSCRA") (50 U.S.C. App. §§ 501 *et seq.*). Testimony by witnesses from the American Bar Association Family Law Section supported this conclusion. Nothing in this bill is intended to amend, change or dilute in any way the rights and protections afforded by the SSCRA.

Existing principles of law also afford both parties some protections against forum shopping. There is a well-established, inveterate body of law concerning the contacts that a potential defendant must have had with a particular jurisdiction before he or she may be served with process—consistent with constitutional requirements of due process—in some locale outside that jurisdiction. *See e.g., McGee* v. *International Life Insurance Co.,* 355 U.S. 220 (1957); *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945).

In addition, existing conflicts-of-law rules can be invoked, even in some community property States, to prevent the member or spouse from having property divided according to the law of a jurisdiction with which the party has had little or no contact. *See e.g., Stephens* v. *Stephens,* 93 N.M. 1, 595 P.2d 1196 (1979). Again, testimony by witnesses from the American Bar Association Family Law Section confirmed the availability of these rules. The Department of Defense pointed to the quasi-community property laws of some States, especially California, as a form of legislative end-run around these conflicts-of-law rules. However, according to outstanding decisions of the California courts, the military member who is sued for divorce in that State, but is not a legal resident or domicile thereof, can contest the application of the California quasi-community property laws to marital property earned outside the State. *See e.g., Addison* v. *Addison,* 43 Cal. Rptr. 97, 399 P. 2d 897 (1965); *In Re Marriage of Roesch,* 83 Cal. App. 3d 96, 147 Cal. Rptr. 586, 593, *cert. denied,* 440 U.S. 915 (1978).

The committee heard no testimony on continued abuses by state courts as a result of alleged forum shopping. Therefore, based on the protections available to spouses and military members under existing law, the committee saw no need to limit the jurisdiction of the State courts by restricting the benefits afforded by this bill to orders based only on certain prescribed types of contacts with the State. In the committee's view, alleged jurisdictional abuses which may arise due to perceived forum shopping are best handled by the courts on a case-by-case basis when raised by the offended party.

Duration of Marriage

S. 1814 as introduced required a spouse or former spouse to have been married to the member for 5 years during which time the member was performing credible service for retirement purposes before the spouse or former spouse could benefit from the provisions of S. 1814. The Department of Defense testified that S. 1814 should be amended to require that the spouse or former spouse be married to the member or former member for at least 15 years during which period the member performed at least 15 years of creditable service. The Department believes that where the marriage is less than 15 years, the spouse may have made less than a major contribution toward a member's career and also is not likely to have sacrificed his or her own career. The Department also testified that the 15-year period was the earliest point at which it

would not lose significant numbers of career members from the Armed Forces due to the susceptibility of retired pay to division. However, the Department testified that it had no data to support its assertions about potential losses of career members from the Armed Forces.

After detailed consideration, the committee believes that adoption of any duration of marriage requirement would be directly contrary to the primary purpose of S. 1814—to return to the States the authority to treat military pensions in the same manner as they treat other retirement benefits. The committee agrees with Dr. Korb's statement that "domestic relations matters [should] be primarily governed by State law, through State courts." But if a marriage requirement of any duration was included in the bill, it would restrict the courts' ability to deal equitably with those who were married less than the required number of years. Thus, the Service Secretaries would be required to honor certain court orders but reject others solely on the basis that they do not meet the marriage requirement. The number of years requirement would be isolated as a factor in determining the entitlement of a spouse or former spouse to the benefits of S. 1814. However, in the committee's view, a certain number of years of marriage should not, in and of itself, qualify or disqualify a spouse or former spouse for the benefits of this legislation. A former spouse may have endured much more hardship in a marriage of 4 years 10 months than a spouse married to the member 5 years or more.

Witnesses from the American Bar Association testified that the State courts routinely consider in one fashion or another the duration of the marriage in judging the equities of a particular marital dissolution. Indeed most State courts, under current law, consider factors such as those set out below when effecting a disposition of marital property:

> . . . the duration of the marriage, any prior marriage of either party, any antenuptial agreement of the parties, the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, and needs of each of the parties, custodial provisions, whether the apportionment is in lieu of or in addition to maintenance (alimony), and the opportunity of each for further acquisition of capital assets and income. The court also considers the contribution of each party in the acquisition, preservation, depreciation, or appreciation in value of the respective estates, and the contribution of a spouse as homemaker or to the family unit. (Section 307, Uniform Marriage and Divorce Act.)

These factors afford the domestic courts and the parties involved the oportunity to assess all the unique circumstances in each case without undue limitation. The duration of marriage should only be one of a number of factors applied in deciding any entitlement to a property interest in retired pay; it should not necessarily be the determining one. The committee believes that the function of weighing all these factors and effecting equitable distribution of marital assets is best preserved for the expertise of the courts involved. Although S. 1814 does not entitle any spouse or former spouse to the

division of military retired pay, the committee does recognize that circumstances might exist in a marriage of short duration to warrant consideration of the former spouse's contribution to the marriage. The bill would permit the parties or the court the discretion to provide the former spouse with an offsetting asset, thereby providing the service member with an undivided entitlement to military retired pay.

Enforcement Limitation for a Portion of Retired Pay

The committee agreed that some portion of a former military member's retired or retainer pay should be sheltered in terms of the Secretaries' concerned enforcement of court orders in connection with a divorce. Therefore, the committee circumscribed the authority of the Secretary concerned to prospectively enforce court orders for alimony, child support and property distribution. No more than 50 percent of the former member's disposable retired or retainer pay is payable under the enforcement mechanism afforded to spouses and former spouses under the bill.

The committee also recognized that in some instances this 50-percent cap could leave unsatisfied portions of an individual's obligations for alimony, child support, or other payments. The committee firmly believed that the government should assist a former spouse in the enforcement of these obligations. Such a policy already is embodied in section 459 of the Social Security Act (42 U.S.C. § 659), which permits a former spouse to garnish up to 65 percent of the disposable earnings of a former military member to satisfy arrearages in child support and alimony.

The committee believes some reasonable accommodation must be made between the former spouse's existing rights under section 459 of the Social Security Act and the equitable concern that some portion of the former member's disposable retired pay remain immune from the existing enforcement mechanism and the new mechanism provided in this bill. Therefore, the bill includes a provision which limits to 65 percent of the disposable retired or retainer pay of a member the total amount payable by the Service Secretary under all court orders pursuant to this bill and all legal processes pursuant to section 459 of the Social Security Act.

Theoretically, this overall cap could leave still unsatisfied portions of alimony, child support or other payments owed a former spouse. However, the committee considers this accommodation between the interests of the two parties to be a reasonable and equitable one. The former spouse is gaining significant new enforcement rights under this bill. The committee believes Congress is making a contribution when it assists the former spouse in obtaining amounts up to this enforcement ceiling of 65 percent of disposable retired or retainer pay. Moreover, the bill makes it clear that the mere attainment of that ceiling in no way absolves the former member of still outstanding legal obligations for alimony, child support or other payments. Any such unsatisfied obligation may be enforced by any means available under law other than those means afforded by this bill or section 459 of the Social Security Act.

SECTION-BY-SECTION ANALYSIS OF S. 1814

A bill to amend title 10, United States Code, to require the Secretary concerned to comply with the terms of certain court orders in connection with the divorce, dissolution, annulment or legal separation of a member or former member of a uniformed service and which affect the retired or retainer pay of such a member or former member, and for other purposes.

The purpose of this five section bill is to remedy some of the problems which are experienced by former spouses of members of the uniformed services. The first section of the bill provides for a short title, the Uniformed Services Former Spouses Protection Act. Section 2 amends chapter 71 of title 10, United States Code, which relates to computation of retired pay, by adding at the end of that chapter a new section 1408 and by adding an item relating to the new section to the table of sections at the beginning of that chapter. Section 3 of the bill makes substantive amendments to subchapter II of chapter 73 of title 10, United States Code, which relates to the Survivor Benefit Plan for members of the uniformed services. Section 4 of S. 1814 makes one major substantive change to chapter 55 of title 10, United States Code, which relates to medical and dental care for members and former members of the uniformed services and for certain dependents of those members and former members. Section 5 of the bill provides for an effective date of the amendments made by the bill and describes the applicability of the substantive amendments.

Section 2(a) of the bill amends chapter 71 of title 10, United States Code, by adding a new section 1408 at the end of that chapter. Section 1408 has seven subsections, (a) through (g).

Subsection (a) of section 1408 provides definitions for seven terms, used throughout section 1408, as follows:

(1) The term "court" is defined to include courts of competent jurisdiction of the fifty States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands. The term also is defined to include those courts of the United States (as defined in section 451 of title 28, United States Code) having competent jurisdiction and any court of competent jurisdiction of any foreign country if there is in effect an agreement between the United States and that foreign country requiring the United States to honor orders from those courts relating to child support, alimony, or property division incident to divorce, dissolution, annulment, or legal separation proceedings in those courts. The term includes only courts which under laws applicable to such courts, have competent jurisdiction to issue orders affecting the retired or retainer pay of a member or former member of the uniformed services. Competent jurisdiction denotes proper *in rem, (*or *quasi-in rem)* and *in personam* jurisdiction. Competent jurisdiction could exist, in a proper case, under the theory of continuing jurisdiction if the court obtained proper jurisdiction over the parties and the property in question during the proceedings.

(2) The term "court order" is defined as the final decree of a court in a divorce, dissolution, annulment, or legal separation proceeding, or a court ordered, ratified, or approved property settle-

ment incident to such a decree, which is issued in accordance with the laws applicable to that court and which expressly provides for the payment of a specified amount, expressed in dollar figures or as a percentage of the disposable retired or retainer pay of a member of the uniformed services, to that member's spouse or former spouse. The term "court order" also includes a final decree which modifies an earlier decree, provided the modifying decree itself has all other required attributes of a "court order" or the modifying decree continues in effect an earlier decree which, as modified, has all required attributes of a "court order." Furthermore, for a final decree to fall within the definition of "court order," the decree must provide for the payment of child support, alimony, or division of property between the member and the member's spouse or former spouse. It is not necessary, however, that the decree provide that the payments ordered to be made from disposable retired or retainer pay be specifically tied to all of these particular classes of obligations. Therefore, it is possible for a court order to direct payments be made from disposable retired or retainer pay so that other obligations of the member to the spouse or former spouse may be satisfied. For example, so long as the decree provides for the payment of child support or alimony, or provides for a division of property between the spouses, the payments directed by the court order could properly be based upon and designed to satisfy attorney's fees which the court has determined should be paid by the member. Likewise, if a member has failed to discharge child support obligations under an existing decree and an arrearage in child support payments exists, a court could, in compliance with the laws of the jurisdiction of that court, enter a modifying decree which directed payments large enough to satisfy the child support payments in arrears as well as the continuing obligation, provided the modifying decree itself or the earlier decree, as modified, meets all requirements of a "court order." A division of property could include, for example, an equitable or equal distribution between the spouses, or a division of community property between the spouses, in States where the law provides for or authorizes such distributions or divisions. However, since the final decree or property settlement incident to the decree must be issued in accordance with the laws applicable to the court issuing the decree, a decree ordering only an equitable distribution of property (and not payment of child support or alimony) and emanating from a court in a jurisdiction in which the law does not authorize or allow such distributions does not meet the definition of court order in section 1408, even though all other requisite conditions are met. Finally, in order for a court decree to meet the definition of "court order," the decree must be final. That is, the decree must be one from which no appeal may be taken or from which no appeal has been taken within the time prescribed under applicable law for the taking of such appeals, or one from which an appeal has been taken and that appeal has been finally decided. For example, a trial court might enter its last decree in a case; however, if an appeal from that order can be and is properly taken from the trial court level to an appellate court, then during the pendency of that appeal the trial court's decree would not qualify as a "court order" under section 1408. In further example, if an appeal from the decision of the ap-

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pellate court is properly taken to a higher appellate court of a State (or to the United States Supreme Court, if there is no higher appellate court in that jurisdiction), then during the pendency of that appeal, any order entered by the trial court or any lower appellate court would not qualify as a "court order" under section 1408. However, the possibility of or the actual bringing of a subsequent or collateral attack on a court's decree, which does qualify as a court order, does not terminate that decree's effectiveness as a court order under section 1408. For example, if a court issued a decree otherwise qualifying as a final decree under section 1408, and no timely appeal was taken from that order, that decree would qualify as a "court order" under section 1408. If subsequent to that decree's qualification as a court order, one of the parties to the initial proceedings were to bring an action in any court, including a Federal court of the United States, alleging, for example, that the trial court's order should be set aside because of the trial court's failure to provide the protections to that party under the Soldiers' and Sailors' Civil Relief Act (50 App. U.S.C. §§ 501 *et seq.*), the bringing of such action would not, in and of itself, terminate the trial court order's status as a "court order." However, if the trial court itself, some higher appellate court in the State system, or a court of the United States, entered a final order setting aside the trial court's order, or ordering a stay of its execution, such subsequent final order could block the enforcement of that trial court's previous final order under section 1408.

(3) The term "disposable retired or retainer pay" is defined as the total retired or retainer pay to which a former member is entitled each month under the provisions of title 10, but not including pay under chapter 61 of title 10 for disability retirement, less several specific deductions. Since members of the National Oceanic and Atmospheric Administration and Public Health Service receive disability retired pay under chapter 61 of title 10, disability retired pay for all members of the uniformed services is excluded from total retired or retained pay. The specific deductions that are to be made from the total monthly retired and retainer pay generally parallel those existing deductions which may be made from the pay of Federal employees and military personnel before such pay is subject to garnishment for alimony or child support payments under section 459 of the Social Security Act (42 U.S.C. 659). These deductions include amounts owed to the United States; amounts required by law to be and which are deducted from retired pay, including amounts of retired pay withheld in order for the member to receive compensation from the Veterans' Administration under title 38 or to receive pay under title 5 for employment by the United States; amounts properly withheld for Federal, State, or local income tax purposes; amounts withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) which are in excess of amounts normally withheld for income tax purposes; amounts deducted for the purpose of payment of Government life insurance premiums (but not additional coverages under such life insurance policies); and amounts deducted from a member's retired or retainer pay for an annuity under the Survivor Benefit Plan, but only if that annuity is to be provided for the spouse or former spouse of the member to whom the payment of a portion of the

member's monthly retired or retainer pay is being made because of a court order in question. In regard to this last deduction, section 3 of S. 1814 amends the provisions of title 10 relating to the Survivor Benefit Plan to permit a member to elect to provide an annuity for a former spouse. If the member chooses to provide such an annuity for former spouse X, then the amounts deducted from the member's retired or retainer pay to provide such an annuity would be deducted in determining "disposable retired or retainer pay" for purposes of making payments to former spouse X under a court order covered by section 1408. However, if the same member had two former spouses, X and Y, and the member elected to provide an annuity for former spouse X and former spouse Y obtained a court order covered by section 1408, then the amounts deducted from the member's retired or retainer pay to provide the annuity for former spouse X would not be subtracted from the member's gross retired or retainer pay in determining "disposable retired or retainer pay".

(4) The term "member" is intended to include any person who is or was appointed or enlisted in, or conscripted into, a uniformed service. For purposes of section 1408 of title 10, the term specifically includes former members of the uniformed services.

(5) The term "spouse or former spouse" is defined as the husband or wife, or former husband or wife, of a member who, on or before the date of a court order, was married to that member.

Subsection (b) of section 1408 provides for the requirements and methods for effective service of a court order on the Secretary concerned. Effective service may be made upon the agent of the Secretary concerned, with such agent being designated under regulations of the Secretary concerned, or if no agent has been designated, then directly upon the Secretary concerned. Such service must be made by certified or registered mail, return receipt requested, or by personal service. Furthermore, for service to be effective, the court order must be regular on its face, must provide the Social Security account number of and must identify the member whose pay is affected, either from the face of the order or from documents accompanying service of the court order. These procedures closely parallel the existing provisions applied to employees of the United States (including members of the uniformed services) set forth in subsection 459(b) of the Social Security Act (42 U.S.C. 659 (b)). The subsection also lays out the criteria for a court order to be "regular on its face."

It also must be recognized that the provisions of section 1408 only will permit payments to be made from a member's or former member's "retired or retainer pay." Most persons receiving retired or retainer pay are subject to recall to active duty. If recalled to active duty, such a person is not entitled to "retired or retainer pay" during that active duty period, but rather is entitled to the pay and allowances prescribed under title 37, United States Code, for the grade, rank, or rating in which the person is serving on active duty. Therefore, during any period of active duty being performed by a person who would otherwise be entitled to retired or retainer pay, the Secretaries concerned could not make payments to a spouse or former spouse pursuant to the authority of section 1408 because that member would not be entitled to retired or re-

tainer pay from which such payments could be made. Of course, during such periods of active duty, the garnishment provisions of section 459 of the Social Security Act (42 U.S.C. 659) would remain available to enforce past due child support and alimony obligations of that member.

Subsection (c) of section 1408 sets forth several conditions and limitations applicable to court orders served and payments made pursuant to section 1408. Paragraph (1) of subsection (c) provides that, subject to the other limitations of section 1408, a court, as defined by paragraph (1) of subsection 1408(a), may treat the disposable retired or retainer pay payable to a member for pay periods beginning on or after June 26, 1981, either as solely the property of the member or as the property of the member and the member's spouse, depending on the law applicable to the court in question. The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of non-disability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.

Paragraph (2) of subsection (c) provides that, regardless of any other law, nothing in section 1408 creates, gives, or permits to exist any right, title, or interest which may be sold, assigned, transferred, or otherwise disposed of by a spouse or former spouse. It is recognized that this limitation is contrary to certain concepts of property laws, especially the concepts of community property laws. That is, it is recognized that when a division of property is made pursuant to a divorce proceeding in a State having community property laws, each spouse usually becomes the sole owner of his or her portion of the community property so that the spouse can sell, assign, transfer, or otherwise dispose of that property without limitation. These rights normally include the right to transfer the property upon death by will or through intestate succession laws. However, the spouse or former spouse should have no greater interest in the retired or retainer pay of a member than the member has. And a member has no right to transfer his retired pay on death. Nor can the member sell, assign, transfer, or otherwise dispose of the member's right to receive retired pay. It is for this reason that paragraph (2) of subsection (c) provides that a spouse or former spouse does not have any transferable right, title, or interest in the member's retired or retainer pay. However, there is no limit on a spouse's or former spouse's right to deal with a portion

of a member's retired or retainer pay after the spouse or former spouse receives that pay.

Finally, paragraph (3) of subsection (c) insures and clarifies that nothing in section 1408 gives any court the authority to order or direct that a member apply for retirement or retire from a uniformed service at any particular time for the purpose of effectuating a payment under that section to a spouse or former spouse. Although the intent of section 1408 is to give the courts having jurisdiction over domestic relations matters great latitude in dealing with uniformed service retired or retainer pay, it is imperative that the control of uniformed service personnel remain with the Federal Government. Therefore, although a court order under section 1408 may provide for the payment of a portion of a member's retired or retainer pay to a spouse or former spouse when that member becomes entitled to such pay even though that member has not yet retired and, therefore, not yet become entitled to such pay, it is not appropriate that any court be empowered to direct or order that a member retire merely so the spouse can receive such payments immediately or at any particular time in the future. To permit any court to have such power would be contrary to the best interests of the United States. Therefore, if a court has jurisdiction over a domestic relations matter involving a member of a uniformed service who is not, at that time, entitled to receive retired or retainer pay, and the court finds that some financial obligation is owed by the member to the spouse or former spouse and that obligation should be met immediately, the court should seek some method to discharge that obligation other than through payments under section 1408.

Subsection (d) of section 1408 constitutes a waiver of the immunity of the United States from the legal process issued by courts (as defined in paragraph (1) of subsection 1408(a)) by directing the Secretary concerned to comply with court orders (as defined by paragraph (2) of subsection 1408(a), when such court orders are effectively served upon that Secretary (as provided in subsection 1408(b)). The Secretary concerned would have 90 days after a court order is effectively served, or in the case of the effective service of a court order affecting the retired or retainer pay of a member who is not yet entitled to receive such pay, 90 days after that member first becomes entitled to receive such pay, whichever is later, to pay to the spouse or former spouse of the member the amount provided for in the court order from the disposable retired or retainer pay of the member. In the latter context, it is not enough that the member has sufficient years of service so that the member could, if the member so desired, retire from the uniformed services and begin receiving retired or retainer pay. Rather, the member must have actually retired from the uniformed service or entered some other status in which the member is actually entitled to receive retired or retainer pay. It is recognized that the bill permits effective service of court orders months or even years before payments under those orders may commence. It is expected that the uniformed services will develop procedures for recording and implementing such orders when the member becomes entitled to receive retired or retainer pay.

Additionally, payments under subsection (d) will not be made more often than once a month, and the Secretary concerned shall not be required to deviate from the normal pay cycle of the uniformed service concerned. This permits all payments being made under court orders covered by section 1408 to be made at one time each month. Furthermore, regardless of the terms of the court order, all payments to a spouse or former spouse from a member's retired or retainer pay will end effective upon the death of the member or upon the death of the spouse or former spouse, whichever occurs first. That is, even if the court order directs payment of an amount to the spouse or former spouse for a certain number of months or each month until a certain date, if either the member or the member's spouse or former spouse to whom the payments are to be made dies before payments have been made for the specified number of months or before the date specified in the court order for the termination of those payments, all payments being made to that spouse or former spouse under the authority of section 1408 stop effective upon that death.

Subsecton (e) of section 1408 contains a number of limitations and guidelines concerning enforcement of court orders by the Secretaries concerned.

Paragraph (1) of subsection (e) places a maximum limit on the portion of a member's disposable retired or retainer pay which may be subject prospectively to monthly payment by the Secretary concerned to a spouse or former spouse, or to more than one spouse or former spouse, under section 1408. That maximum limit is 50 percent of a member's monthly disposable retired or retainer pay. For example, if a member's gross monthly retired or retainer pay is $1,000, and the deductions authorized to be made from that gross pay in arriving at disposable retired or retainer pay total $300, then the maximum monthly amount which may prospectively be paid by the Secretary concerned from that member's retired or retainer pay pursuant to a court order or court orders under section 1408 may not exceed $350. This sum is arrived at by subtracting the deductions authorized by paragraph (3) of subsection 1408(a) from the member's gross monthly retired or retainer pay and multiplying that sum by 50 percent (50 percent$\times$[1,000$-$300]). This maximum limit of 50 percent of disposable retired or retainer pay applies even if more than one spouse or former spouse of a member obtains and effectively serves a court order upon the Secretary concerned, or the Secretary's agent, pursuant to section 1408.

Paragraph (2) of subsection (e) establishes the priority to be given multiple court orders affecting the retired or retainer pay of one member when such orders are effectively served and are in favor of a spouse and one or more former spouses or more than one former spouse of that member. Such orders are to be satisfied by the Secretary concerned on a first-come, first-served basis. That is, the first court order effectively served under section 1408 will have priority over any orders served later. Any subsequently served orders will be satisfied out of any disposable retired or retainer pay which remains subject to payment under section 1408. Again, these provisions closely parallel the priority provisions relative to garnishment of Federal employee pay found in subsection 461(c) of the Social Security Act (42 U.S.C. 661(c)). Additionally, if the court

order served first directs payment of the maximum amount of disposable retired or retainer pay established by paragraph (1) of subsection 1408(e) (i.e., 50%), then there is no money available for prospective payment by the Secretary concerned under any subsequently served order, so long as payments continue to be made under the court order served first.

Paragraph (3) of subsection (e) provides a procedure for making payments under and resolving conflicts in cases involving two or more court orders which purport to order payments of differing amounts of the disposable retired or retainer pay of one member to one spouse or former spouse. In such cases, the Secretary concerned, subject to the maximum 50 percent limitation established by paragraph (1) of subsection (e), shall pay to the spouse or former spouse the least amount required to be paid under any of those conflicting court orders. The Secretary concerned would retain the amount of disposable retired or retainer pay that is the lesser of (1) the difference between the largest amount owed under a conflicting order and the amount already paid to the spouse or former spouse, or (2) the amount of disposable retired or retainer pay which remains available for payment in accordance with the applicable percentage limitations under this section on the amount of disposable retired or retainer pay which can be paid out monthly by the Secretary concerned. Finally, the Secretary concerned, after subtracting any amounts already paid that month in satisfaction of garnishment or earlier section 1408 orders, would pay to the member the remaining disposable retired or retainer pay minus both (1) the amounts paid to the former spouse, and (2) the amount retained. This will result in the amount in dispute, or that portion of that amount in dispute which is the maximum which could be paid under the conflicting court orders, being held in trust for the parties until the conflict in the orders can be resolved. The Secretary concerned will hold the retained amount until he is provided with a court order, certified by both the member and the spouse or former spouse as being valid and applicable to the retained amount. Then the retained amount will be paid to the respective parties in accordance with the terms of that certified court order. Since neither party will be receiving the amount in dispute until the conflict is resolved, there will be an incentive to both parties to quickly resolve such conflicts.

This provision will operate as follows: Assume that the member is entitled to $1,000 monthly in retired or retainer pay and that the authorized deductions are $200, resulting in disposable retired or retainer pay of $800. If the Secretary concerned were to be effectively served with two court orders directing payments of $100 a month and $300 a month, respectively, to former spouse X from the disposable retired or retainer pay of that member, the Secretary concerned would pay to former spouse X the lowest required amount of $100. In this case, the Secretary concerned would retain an amount equal to the difference between the largest amount owed under a conflicting court order ($300) and the lowest amount payable under such an order ($100); in this example, that would be $200. Finally, the Secretary concerned would pay to the member the sum equal to the disposable retired or retainer pay ($800) minus the amount paid ($100) and the amount retained ($200), for a

payment of $500. If the conflict was not resolved until the end of three months and payments had been made for each of those three months, a sum of $600 would have been retained. If the Secretary was then provided with a court order, certified by both the member and former spouse X as being valid and applicable to the $600 being held by the Secretary, which provided that former spouse X should be paid $200 a month, the Secretary would pay a total of $300 to former spouse X and $300 to the member.

If the same disposable retired or retainer pay is assumed ($800), and former spouse A effectively serves a court order directing payment of $100 a month from the member, but thereafter two conflicting court orders in favor of former spouse B are effectively served, one of which directs payment of $100 a month to B and the other of which directs payment of $400 a month to B, the following would result. The Secretary concerned would first pay former spouse A $100, as the court order in favor of that former spouse was served first. The Secretary would then pay former spouse B the sum of $100 (the lesser amount required by the two conflicting orders). In this case, the Secretary concerned would retain an amount equal to the sum which remains available for payment in accordance with the applicable percentage limitations under this section on the amount of disposable retired pay which can be paid out monthly by the Secretary concerned. In this case, that would be $200 since the maximum amount available for prospective payment by the Secretary concerned would be $400 (50% of $800) and the Secretary already has paid out $100 to spouse A and $100 to spouse B. Finally, the Secretary concerned, after subtracting the $100 paid to spouse A, would pay to the member the sum equal to the remaining disposable retired or retainer pay ($700) minus both the amount already paid to spouse B ($100) and the amount retained ($200). Thus, the member would receive $400.

Paragraph (4) of subsection (e) establishes a priority for payments to be made from the retired or retainer pay of a member when legal process under section 459 of the Social Security Act (42 U.S.C. 659) and a court order under new section 1408 are both properly served and direct that payments be made from such pay during the same period. Section 459 of the Social Security Act requires the United States to honor properly served legal process which is in the nature of garnishment to enforce delinquent child support or alimony obligations of employees of the United States, including members of the uniformed services. New section 1408 of title 10 will provide a second method of enforcing such obligations on the part of members of the uniformed services who are entitled to retired or retainer pay. (It is noted that section 459 of the Social Security Act permits garnishment only to enforce child support or alimony obligations, while section 1408 of title 10 will permit payments to be made from retired or retainer pay based on obligations not only for child support and alimony, but for division of property between spouses as well). Although it is expected that section 1408 will become the preferred and predominant method of involuntarily collecting child support and alimony obligations of retired members of the uniformed services, it is not the intent or purpose of the bill to deny proper parties the use of the enforcement provisions of section 459 of the Social Security Act. However, it is also not the

intent of the bill that the garnishment provisions of section 459 of the Social Security Act and the collection provisions of section 1408 of title 10 operate separate and independent of each other so that a retired member potentially could be deprived of 100% of retired or retainer pay. It is therefore necessary to establish a proper relationship between legal process under section 459 of the Social Security Act and a court order under section 1408 both of which affect the retired and retainer pay of the same member at the same time.

Under subparagraph (4)(A) of subsection (e) of section 1408, legal process under section 459 of the Social Security Act and court orders under section 1408 both of which affect the retired or retainer pay of the same member will be afforded equal status and will be satisfied out of that member's retired or retainer pay on a first-come, first-served basis, based upon the date of proper service of each. In the event of the service of both legal process and a court order, the maximum amount of retired or retainer pay which can be paid out by the Secretary concerned to satisfy each must be determined. To make this determination, additional existing provisions of law come into play. Specifically, paragraph (2) of subsection 303(b) of the Consumer Credit Protection Act (15 U.S.C. 1673(b)(2)) establishes maximum percentage limits of an individual's "disposable earnings" which may be subject to garnishment to enforce any order for support of any person. These limits are applicable to all garnishment actions under section 459 of the Social Security Act. Nothing in this legislation modifies the percentage limitations included in 15 U.S.C. 1673(b)(2).

With the limitations on the amounts that may be used to satisfy garnishment process and court orders established, both enforcement procedures will operate in tandem. However, subparagraph (B) of paragraph (4) of subsection (e) of section 1408 places a maximum limitation of 65 percent on the total amount of the disposable retired or retainer pay payable by the Secretary concerned under all court orders pursuant to section 1408 and under all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659).

Paragraph (5) of subsection (e) provides for an efficient and equitable procedure for handling court orders which, on their face, direct the payment of a portion of a member's disposable retired or retainer pay in excess of the maximum amount established under paragraph (1) of subsection 1408(e), or which, because of existing payments being made pursuant to a court order previously served or pursuant to legal process previously served under section 459 of the Social Security Act, direct payment of an amount which, when combined with the amount already being paid pursuant to the earlier court order or legal process, exceeds the maximum amounts subject to payment under paragraph (1) or subparagraph 4(B) of subsection 1408(e). Paragraph (5) provides that in either of the situations described, such a court order shall not be deemed to be irregular on its face solely for the reason that it directs payment of an excessive amount or has that effect. However, if such an order is effectively served, that order shall be deemed to be fully satisfied for purposes of section 1408 when the spouse or former spouse is paid the maximum amount available for such payments.

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Paragraph (6) of subsection (e) is intended to preserve vehicles of enforcement—other than those available under section 1408 and the garnishment statute—where a member's liability for child support, alimony or other payments exceeds the maximum amounts the Secretary is authorized to pay out of disposable retired or retainer pay under section 1408. The paragraph makes clear that a member is not relieved of liability for the payment of obligations for alimony, child support or other payments required by a court order on the grounds that payments made by the Secretary concerned out of disposable retired or retainer pay have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4) of subsection (e). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under section 1408 (where the maximum amount permitted under paragraph (1) of section 1408(e) has been paid) and under section 459 of the Social Security Act (42 U.S.C. 659) (where the maximum amount permitted under subparagraph (B) of paragraph (4) of section 1408(e) has been paid).

Paragraph (1) of subsection (f) of section 1408 provides that neither the United States nor any officer or employee of the United States shall be liable to any member or spouse or former spouse of a member for any payment made from moneys due that member, spouse or former spouse, if such payment is made pursuant to a court order regular on its face and such payment is made in accordance with section 1408 and regulations prescribed by the Secretary concerned to carry out the section. The protections established by this provision are virtually identical to the protections afforded the United States and its employees by subsection 459(f) of the Social Security Act (42 U.S.C. 659(f)) with regard to payments made pursuant to legal process in the nature of garnishment from the pay due employees of the United States in enforcement of child support and alimony obligations.

Paragraph (2) of subsection (f) provides that no officer or employee of the United States whose duties include responding to interrogatories which may arise as the result of court orders issued or to be issued under section 1408 or which relate to a member's obligations which are enforceable under such a court order shall be subject under any law to any disciplinary action or civil or criminal liability or penalty for or on account of the disclosure of information made by such an officer or employee in carrying out those duties. This protection is virtually identical to the protections afforded by subsection 459(c) of the Social Security Act (42 U.S.C. 659(c)) to persons whose duties include responding to relevant interrogatories which may relate to Federal employees' child support or alimony obligations which may be enforced by legal process served under section 459 of the Social Security Act. Although the bill does not specifically provide for the answering of relevant interrogatories which may arise as the result of implementation of new section 1408 of title 10, United States Code, it is intended that the regulations of the Secretaries concerned required by subsection (f) of new section 1408 will provide for the answering of such relevant interrogatories.

Subsection (g) of section 1408 requires that whenever any person designated to receive court orders under section 1408 is effectively served with a court order, that person will as soon as possible, but not later than 30 days after effective service, send a written notice of the court order, including a copy of the court order itself, to the member whose retired or retainer pay is affected by such order. Such notice may be given by mail at the last known address of the member. A member receiving retired or retainer pay must presently furnish the uniformed service concerned with some address to which retired pay is to be sent. This address, in some cases, could be a financial institution. Unless the member has taken positive action, in writing, directing the uniformed service concerned to send the notice required by subsection (g) to an address other than that to which retired or retainer pay is normally forwarded, then notice directed to the address to which such pay is sent is sufficient. This subsection is designed to provide a measure of protection to the member whose pay is affected by a court order, so that the member may take whatever action, legal or otherwise, which the member may believe to be appropriate in response to the service of the court order. However, there is no requirement under subsection (g) that the member actually receive notice of the service of the court order; the only requirement is that such notice be sent. As is true of many of the other procedural provisions of section 1408, the provisions of subsection (g) closely parallel the provisions of section 459 of the Social Security Act (42 U.S.C. 659), specifically those which relate to notice of service of process for garnishment of Federal employees' pay.

Subsection (h) of section 1408 provides that the Secretaries concerned shall prescribe uniform regulations for the administration of section 1408 in the uniformed services. It is necessary that the procedures for implementing and carrying out section 1408 be consistent and uniform in each of the uniformed services both to avoid confusion among the public and to avoid possible unequal treatment to members of different uniformed services. Among other things, these regulations will designate appropriate service agents for each uniformed service, will provide for procedures for handling multiple court orders which appear to conflict with each other, and will provide appropriate procedures for responding to relevant interrogatories which may properly arise as the result of implementation of section 1408.

Subsection 2(b) of the bill amends the table of sections at the beginning of chapter 71 of title 10, United States Code, by adding at the end of that table a new item relating to new section 1408.

Section 3 of S. 1814 amends subchapter II of chapter 73 of title 10, United States Code, which establishes and provides for the administration of a Survivor Benefit Plan (SBP). The purpose of section 3 of S. 1814 is to provide members eligible to participate in that Plan the additional option, under certain conditions, of electing to provide an annuity for a former spouse, even if that former spouse has no insurable interest in the member. Specifically, section 3(a) of S. 1814 would amend section 1447 of title 10, which provides definitions for the purposes of subchapter II of chapter 73 of that title, by adding at the end of that section a definition of "former spouse"; "court"; "court order"; "final decree" and "regu-

lar on its face". For purposes of the SBP, "former spouse" is defined as the surviving former husband or wife of a member eligible to participate in SBP.

Subsection 3(b) of the bill amends section 1448 of title 10, which describes the application of SBP. Presently, under subsection (b) of section 1448, a person who is not married, does not have a dependent child (as defined by section 1447(5) of title 10) and is eligible to participate in SBP may elect to provide an annuity to a natural person, but only if that natural person has an insurable interest in the person electing to provide the annuity. Under the present criteria, it is possible under a few, but not all, circumstances for a person eligible to participate in SBP to elect to provide an annuity to a former spouse. That is, if a former spouse continues to have an insurable interest in the person eligible to participate, the annuity may be provided to that former spouse. However, it is only in unusual situations, often ones involving dependent children, in which a former spouse retains an insurable interest in a former husband or wife. Yet, it is appropriate, in light of the unusual circumstances often faced by a former spouse of a uniformed service member, to permit a person eligible to participate in the Plan to elect to provide an annuity to a former spouse, regardless of whether that former spouse retains an insurable interest in the participant. Therefore, section 3(b) of the bill amends subsection 1448(b) of title 10 to permit such an election.

This amendment to subsection 1448(b) of title 10 will give increased flexibility to certain persons eligible to participate in the Plan and will permit those persons to provide a measure of financial protection to a former spouse in the event of termination of a marriage. At the same time, the amendment continues the basic concept of SBP that an election to provide any annuity is strictly the option of the person eligible to participate in that Plan. That is, no person could be required to provide an annuity to a former spouse. In this regard, existing subsection 1450(f) of title 10, United States Code, permits an unmarried person who elects to provide an annuity to a person under the authority of subsection 1448(b), but who later marries or acquires a dependent child, to change that previous election and provide an annuity to the spouse or dependent child. Under this language, a person who elects to provide an annuity to a former spouse under subsection 1448(b), as amended by section 3(b) of the bill, can have that election remain in effect in order to effectuate the terms of a voluntary written agreement entered into with a former spouse, or to change that election to provide an annuity for the existing spouse or newly acquired dependent child. If a member elects to designate a former spouse as beneficiary of the SBP annuity, the member shall at the time of making such election, provide to the Secretary concerned a written statement setting forth whether the election is being made pursuant to a voluntary written agreement between the parties, and if so, whether such agreement has been incorporated in, ratified or approved by a court order.

Subsection 3(c) of S. 1814 makes technical and conforming amendments to subparagraph (4) of subsection 1450(a) of title 10, United States Code.

Subsection 3(d) of the bill establishes notification requirements by the Secretary of Defense to the former spouse when a change of election is made. In cases where a voluntary written agreement has been entered into by a member which has been incorporated in, ratified or approved by a court order, such an election may not be changed unless the Secretary concerned has received a certified copy of a court order which modifies all previous court orders relating to such election. In cases in which the parties' voluntary written agreement has not been incorporated in, ratified, or approved by a court order, an election to a former spouse may not be changed unless a statement signed by the former spouse, which evidences such former spouse's agreement to a change of election, has been received by the Secretary concerned.

Section 4 of S. 1814 makes one major substantive change and several conforming and technical changes to chapter 55 of title 10, United States Code, which relates to medical and dental care for members and former members of the uniformed services and for certain dependents of those members and former members.

Subsection 4(a) makes a major substantive change in section 1072(2) of title 10, which provides for a definition, for purposes of sections 1071–1087 of that title, of "dependent" with respect to a member or former member of the uniformed services, and makes several conforming changes required by the substantive change. Specifically, for the purposes of the health care provisions of sections 1071–1087 of title 10, the term "dependent" with respect to a member or former member of the uniformed services, as defined by section 1072(1) of title 10, is amended to include certain unremarried former spouses of such members or former members, but only for a limited period of time after the former spouse's marriage to the member or former member is terminated. To qualify as a dependent of a member or former member for purposes of health care under sections 1071–1087 of title 10, the former spouse must have been married to the member or former member for a period of at least 20 years on or before the date of the divorce, dissolution, or annulment of the marriage. Furthermore, during the period of marriage, the member must have performed at least 20 years of service which are creditable in determining the member's or former member's eligibility for retired or retainer pay or equivalent pay from the uniformed services.

Under the expanded definition of "dependent", a qualified former spouse remains eligible for health care under sections 1071–1087 of title 10 for a period of 180 days following the date of the final decree of divorce, dissolution, or annulment, provided that the former spouse remains unremarried. Remarriage during the 180-day period will terminate the dependency status based upon the terminated marriage. A determination of whether an individual is entitled to dependency status as a "former spouse", and if so, when that dependency status begins and ends, shall be made under the existing authority of section 1084 of title 10.

However, subsection 4(b) adds a new section 1090 to chapter 55 of title 10, United States Code, which provides that under certain specified circumstances, the 180-day period following termination of a marriage, during which a qualified unremarried former spouse is eligible for health care benefits from the uniformed services, will

be extended by the Secretary of the uniformed service concerned for such period as deemed necessary for the continued treatment of a illness, disease or other specific medical condition (but not a dental condition) which existed prior to the end of the 180-day period which begins on the date of the final decree of divorce, dissolution or annulment, but only if treatment for that illness, disease or other specific condition has been provided by the uniformed sevices, either in uniformed services' facilities or under uniformed services health care plans, prior to the end of that same 180-day period. Under these criteria, the mere diagnosis of a medical condition is not sufficient to permit extension; treatment must have been received for the illness, disease or other specific condition within the 180-day period. This multiple requirement is designed to prevent requests from former spouses for an extension of health care benefits for a medical condition which exists before the end of the 180-day period but which was only discovered after the end of that period.

Subsection 4(c) of S. 1814 amends subparagraph (2)(B) of subsection 1076(b) of title 10, United States Code. Paragraph (2) of subsection 1076(b) presently provides that, under regulations jointly prescribed by the Secretary of Defense and the Secretary of Health and Human Services, a dependent of a member or former member of the uniformed services who (1) died before attaining age 60 and who at the time of death would have been eligible for retired pay under chapter 67 of title 10 for non-regular service, except for the fact that the member did not attain age 60 before death, and (2) had elected to participate in the Survivor Beneft Plan (SBP) established under subchapter II of Chapter 73 of title 10, may be given medical and dental care, upon request, in facilities of the uniformed services. The second of these two requirements, i.e., the deceased member has elected to participate in the SBP, is an appropriate condition for the granting of medical and dental care for most dependents. However, it is not appropriate to require a member to elect to participate in SBP merely so the member's former spouse, as defined by the expanded definition of dependent in subparagraph (F) of subsection 1072(2) of title 10, may be provided medical and dental care. In fact, if this requirement were to be applicable to a former spouse of such a member, the member could effectively deny medical and dental care eligibility to a former spouse by merely electing not to participate in SBP. This would be contrary to the intent that all unremarried qualified former spouses have eligibility for medical and dental care for a limited time after termination of their marriages, without regard to the desires or actions of their former spouses who are members or former members of the uniformed services. For these reasons, section 4(b) of the bill amends subparagraph (2)(B) of subsection 1076(b) of title 10 to make the requirement for participation in SBP inapplicable in determining the eligibility for medical and dental care of a former spouse of a member or former member described in that section.

Subsection 4(d) of S. 1814 makes an amendment to the text of section 1079 of title 10 to provide that qualified former spouses of members on active duty may be provided the same health care benefits under contract health care plans as are provided to

spouses and children of such members. It is noted that contract health care plans established under section 1079 must provide for the payment by the patient of certain amounts for the health care provided under those plans. In the case of health care provided under such a plan to a former spouse, it is the former spouse, and not the member, who is responsbile for the payment of the patient fees. It is further noted that a former spouse does not qualify for the additional care for moderate or severe mental retardation or for a serious physical handicap which is authorized for certain dependents by subsection (d) of section 1079 of title 10, United States Code. Finally, the bill makes no amendment to section 1086 of title 10, which provides for contract health care plans for, among others, dependents of members or former members who are, or, if deceased, were, at time of death, entitled to retired or retainer pay, and dependents of members or former members who die before attaining age 60 but who would have been eligible for retired pay under chapter 67 of title 10, for non-regular service, except for the fact that they were under 60 years of age. A qualified former spouse of such a member is eligible to receive health care benefits under these plans by virtue of that former spouse's status as a dependent of such a member under subparagraph (F) of subsection 1072(2) of title 10, as added by subsection 4(a) of the bill.

Subsection 4(e) of the bill makes technical and conforming amendments to the section headings of sections 1080, 1081, and 1083 of title 10, United States Code, to reflect that those sections now each apply not only to spouses and children, but also apply to persons who qualify as former spouses under that new dependency status, as added by subsection 4(a) of the bill.

Subsection 4(f) of the bill makes technical and conforming amendments to the items relating to sections 1079, 1080, 1081, and 1083 in the table of sections at the beginning of chapter 55 of title 10 to reflect the changes made by subsection 4(d) of the bill to the section headings of those sections.

Section 5 of S. 1814 provides for an effective date for the amendments made by the bill and provides for the applicability of those amendments.

Subsection (a) of section 5 of the bill provides that the amendments made by the bill will take effect on the first day of the first month which begins more than 120 days after enactment.

Subsection (b) of section 5 provides that new subsection 1408(d) of title 10, United States Code, shall apply only to payments from retired or retainer pay which are payable to a member or former member for months beginning on or after the effective date. This subsection does not, however, limit the application of section 1408 of title 10 to any particular class of persons. That is, any person who can qualify as a spouse or former spouse under the criteria of section 1408 of title 10, regardless of the date of a divorce, dissolution, annulment, or legal separation from a member or former member of the uniformed services, may utilize the provisions of that section. Likewise, the date of a court order does not control the applicability of section 1408. Therefore, a court order issued before the effective date of the amendments, if such court order meets the criteria of subsection 1408(a) of title 10, may be enforced under section 1408. However, no effective service of any court order

could occur until the effective date. It is recognized that, because of specificity required by paragraph (3) of subsection 1408(a) for a court decree to qualify as a court order under that paragraph, former spouses of members or former members of the uniformed services may have to seek modification of decrees previously entered in order for such decrees to be enforceable under section 1408. The question of whether previously entered court decrees should be modified to comply with the requirements of section 1408 of title 10 is one properly left for the determination of courts having jurisdiction to make such modifications.

Subsection (c) of section 5 provides that the amendments made by section 3 of the bill, which provide certain eligible participants in the Survivor Benefit Plan with the new voluntary option of electing to provide an annuity to certain former spouses of such participants, shall apply only to persons who become eligible to make an election to participate in that Plan on or after the effective date.

Subsection (d) of section 5 provides that the amendments made by section 4 of the bill, which provides limited health and dental care coverage for certain former spouses, shall apply only if the final decree of divorce, dissolution or annulment of the marriage of the former spouse and such member or former member is dated on or after the effective date.

Subsection (e) of section 5 provides definitions of the terms "court order," "former spouse," and "uniformed services" for the purposes of such section.

Committee Action

On July 14, 1982, the Committee on Armed Services voted unanimously to report S. 1814 as amended.

Congressional Budget Office Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, D.C. July 19, 1982.

Hon. John Tower,
Chairman, Committee on Armed Services,
U.S. Senate, Washington, D.C.

Dear Mr. Chairman: Pursuant to Section 403 of the Congressional Budget Act of 1974, the Congressional Budget Office has reviewed S. 1814, the Uniformed Services Former Spouses' Protection Act, as ordered reported by the Senate Committee on Armed Services, on July 15, 1982.

Should the Committee so desire, we would be pleased to provide further details on this estimate.

Sincerely,

Alice M. Rivlin, *Director.*

Congressional Budget Office Cost Estimate, July 19, 1982

1. Bill number: S. 1814.
2. Bill title: Uniformed Services Former Spouses' Protection Act.

3. Bill status: As ordered reported by the Senate Committee on Armed Services on July 15, 1982.

4. Bill purpose: The bill requires the secretaries of the military services to comply with the terms of court orders concerning the divorce, dissolution annulment, or legal separation of a member or former member of a uniformed service which require the payment of a portion of the member or former member's retired or retainer pay to a former spouse. The purpose of these provisions is to clarify the responsibility of the service secretaries to enforce court decisions regarding the division of retired or retainer pay.

The bill also authorizes the provision of medical and dental care for an unremarried former spouse for a period of 180 days following the divorce, dissolution, or annulment of a marriage if, on the date of the final decree, the unremarried former spouse had been married to the member or former member for at least twenty years during which the member or former member performed at least twenty years of service creditable towards retired or retainer pay. Under current law, former spouses are not eligible for medical and dental care. The 180-day period is required to be extended indefinitely for an unremarried former spouse solely for the purpose of continuing medical treatment (excluding dental care) which was provided before the end of the 180-day period. This provision is intended to provide coverage for chronic medical conditions which were treated during the 180-day period.

The bill provides authorizations subject to subsequent appropriation action.

5. Cost estimate:

[By fiscal year, in millions of dollars]

	1983	1984	1985	1986	1987
Estimated authorization	0.3	1.4	2.2	3.1	4.2
Estimated outlays	0.2	1.3	2.0	2.9	3.9

The costs of this bill fall within budget function 050.

6. Basis of estimate: The costs of this bill result entirely from the provision of medical and dental care for former spouses. The provisions concerning the division of retired or retainer would redistribute, but not increase, outlays for retired and retainer pay.

Estimates of the number of members or former members who were married for twenty or more years and then divorced were derived by applying U.S. Census Bureau and Department of Health and Human Services marriage and divorce rates to the number of married members with twenty or more years of service.

The average yearly cost of medical and dental care (including treatment of chronic conditions) was based on Department of Defense estimates of the average yearly cost of care received in military facilities and under CHAMPUS (Civilian Health and Medical Program of the Uniformed Services). Estimates of the number of persons requiring continued treatment for chronic illnesses were based on Department of Defense health survey data concerning the incidence of chronic illnesses.

It is assumed that this bill will be enacted by September 30, 1982. However, the bill's effective date is the first day of the first month which begins more than 120 days after the date of enactment, or February 1, 1983. The first-year cost of the bill, therefore, is only 67% of the full year's cost.

7. Estimate comparison: This estimate differs slightly from the estimate prepared by the Department of Defense. The CBO estimate is based on a larger eligible population and higher inflation assumptions in future years.

8. Previous CBO estimate: None.

9. Estimate prepared by: Alice L. Hughey.

10. Estimate approved by:

C. G. NUCKOLS
(For James L. Blum,
Assistant Director for Budget Analysis).

REGULATORY IMPACT

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires that a report on the regulatory impact of a bill be included in the report on such bill. The committee finds that in the case of S. 1814 there is no regulatory impact.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law proposed to be made by the bill are shown as follows: Existing law to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman.

TITLE 10, UNITED STATES CODE

Subtitle A—General Military Law

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PART I—ORGANIZATION AND GENERAL MILITARY POWERS

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CHAPTER 55.—MEDICAL AND DENTAL CARE

Sec.
1071. Purpose of sections 1071–1087 of this title.
1072. Definitions.
1073. Administration of this chapter.
1074. Medical and dental care for members and certain former members.
1075. Officers and certain enlisted members; subsistence charges.
1076. Medical and dental care for dependents: general rule.
1077. Medical care for dependents: authorized care in facilities of uniformed services.
1078. Medical and dental care for dependents: charges.
1079. Contracts for medical care for spouses [and children], *children, and certain former spouses:* plans.
1080. Contracts for medical care for spouses [and children], *children, and certain former spouses*]: election of facilities.
1081. Contracts for medical care for spouse [and children], *children, and certain former spouses*: review and adjustment of payments; reports.
1082. Contracts for health care: advisory committees.
1083. Contracts for medical care for spouses [and children], *children, and certain former spouses*: additional hospitalization.
1084. Determinations of dependency.
1085. Medical and dental care from another executive department: reimbursement.
1086. Contracts for health benefits for certain members, former members, and their dependents.
1087. Programing facilities for certain members, former members, and their dependents in construction projects of the uniformed services.
1088. Air evacuation patients: furnished subsistence.
1089. Defense of certain suits arising out of medical malpractice.
1090. Former spouses; extension of entitlement of medical care under certain circumstances.

* * * * * * *

§ 1072. Definitions

In this chapter:

(1) "Uniformed services" means the armed forces and the Commissioned Corps of the National Oceanic and Atmospheric Administration and of the Public Health Service.

(2) "Dependent", with respect to a member or former member of a uniformed service, means—

(A) the spouse;

(B) the unremarried widow;

(C) the unremarried widower;

(D) an unmarried legitimate child, including an adopted child or a stepchild, who either—

(i) has not passed his twenty-first birthday;

(ii) is incapable of self-support because of a mental or physical incapacity that existed before that birthday and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; or

(iii) has not passed his twenty-third birthday, is enrolled in a full-time course of study in an institution of higher learning approved by the Secretary of Defense or the Secretary of Health and Human Services, as the case may be, and is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support; [and]

(E) a parent or parent-in-law who is, or was at the time of the member's or former member's death, in fact dependent on him for over one-half of his support and residing in his household[.]; *and*

(F) for a period of 180 days following the date of a final decree of divorce, dissolution, or annulment of a marriage to a member or former member, the unremarried former spouse if, on the date of such final decree of divorce, dissolution, or annulment, that former spouse had been married to the member or former member for a period of at least 20 years during which period the member or former member performed at least 20 years of service which is creditable in determining that member's or former member's eligibility for retired or retainer pay, or equivalent pay, as a result of his service in any of the uniformed services.

* * * * * * *

§ 1076. Medical and dental care for dependents: general rule

(a) * * *

(b) Under regulations to be prescribed jointly by the Secretary of Defense and the Secretary of Health and Human Services, a dependent of a member or former member—

(1) who is, or (if deceased) was at the time of his death, entitled to retired or retainer pay or equivalent pay; or

(2) who died before attaining age 60 and at the time of his death (A) would have been eligible for retired pay under chapter 67 of this title but for the fact that he was under 60 years of age, and (B) had elected to participate in the Survivor Benefit Plan established under subchapter II of chapter 73 of this title;

may, upon request, be given the medical and dental care prescribed by section 1077 of this title in facilities of the uniformed services, subject to the availability of space and facilities and the capabilities of the medical and dental staff, except that a dependent of a member or former member described in clause (2) may not be given such medical or dental care until the date on which such member or former member would have attained age 60. *A dependent described in section 1072(2)(F) of this title may be provided medical and dental care under this chapter without regard to subclause (B) of clause (2) of the first sentence of this subsection.*

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§ 1079. Contracts for medical care for spouses [and children] , *children, and certain former spouses*: plans

(a) To assure that medical care is available for spouses [and children], *children, and certain former spouses (as described in section 1072(2)(F) of this title)* of members of the uniformed services who are on active duty for a period of more than thirty days, the Secretary of Defense, after consulting with the Secretary of Health and Human Services shall contract, under the authority of this section for medical care for those persons under such insurance, medical service, or health plans as he considers appropriate. The type of health care authorized under this section shall be the same as those provided under section 1976 of this title except that—

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§ 1080. Contracts for medical care for spouses [and children] , *children, and certain former spouses*: election of facilities

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§ 1081. Contracts for medical care for spouses [and children] , *children, and certain former spouses*: review and adjustment of payments; reports

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§ 1083. Contracts for medical care for spouses [and children] , *children, and certain former spouses*: additional hospitalization

* * * * * * *

§ 1090. Former spouses; extension of entitlement to medical care under certain circumstances

Under such regulations as the Secretary of Defense may prescribe, after consulting with the Secretary of Health and Human Services, the 180-day period described in section 1072(2)(F) of this title shall be extended with respect to any former unremarried spouse of a member or former member for the purpose of providing medical care for any illness or disease for which such spouse was provided medical care under this chapter before the end of such 180-day period.

* * * * * * *

CHAPTER 71—COMPUTATION OF RETIRED PAY

Sec.

1401. Computation of retired pay.
1401a. Adjustment of retired pay and retainer pay to reflect changes in Consumer Price Index.
1402. Recomputation of retired or retainer pay to reflect later active duty.
1403. Disability retired pay: treatment under title 26.
1404. Applicability of section 8301 of title 5.
1405. Years of service.
1406. Limitation on revocation of retired pay.
1407. Retired pay base.
1408. Payment of retired or retainer pay in compliance with court orders.

* * * * * * *

§ 1408. Payment of retired or retainer pay in compliance with court orders

(a) In this section:

(1) "Court" means—

"(A) any court of competent jurisdiction of any State, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Northern Mariana Islands, and the Trust Territory of the Pacific Islands;

(B) any court of the United States (as defined in section 451 of title 28) having competent jurisdication; and

(C) any court of competent jurisdiction of any foreign country with which the United States has an agreement requiring the United States to honor any court order of such country.

(2) "Court order" means a court's final decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), which—

(A) is issued in accordance with the laws of the jurisdiction of that court;

(B) provides for—

(i) payment of child support (as defined in section 462(b) of the Social Security Act (42 U.S.C. 662(b)));

(ii) payment of alimony (as defined in section 462(c) of the Social Security Act (42 U.S.C. 662(c))); or

(iii) division of property (including a division of community property, and

(C) specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposal retired or retainer pay, from the disposal retired or retainer pay of a member to the spouse or former spouse of that member.

For purposes of this definition, "final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for taking such appeals under the laws applicable to such appeals, or a decree from which timely appeal has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(3) "Disposal retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled (other than the retired pay of a member retired for disability under chapter 61 of this title) less amounts which—

(A) are owed by such member to the United States;

(B) are required by law to be, and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martial, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38;

(C) are properly withheld for Federal, State, or local income tax purposes, if the withholding of such amounts is authorized or required by law and to the extent such

amounts withheld are not greater than would be authorized if such member claimed all dependents to which he was entitled;

(D) are withheld under section 3402(i) of the Internal Revenue Code of 1954 (26 U.S.C. 3402(i)) if such member presents evidence of a tax obligation which supports such withholding;

(E) are deducted as Government life insurance premiums (not including amounts deducted for supplemental coverage); or

(F) are deducted because of an election under chapter 73 of this title to provide an annuity to a spouse or former spouse to whom payment of a portion of such member's retired or retainer pay is being made pursuant to a court order under this section.

(4) "Member" includes a former member.

(5) "Spouse or former spouse" means the husband or wife, or former husband or wife, respectively, of a member who, on or before the date of a court order, had been married to that member.

(b) For the purposes of this section—

(1) service of a court order is effective if—

(A) an appropriate agent of the Secretary concerned designated for receipt of service of court orders under regulations prescribed pursuant to subsection (h) or, if no agent has been so designated, the Secretary concerned, is personally served or is served by certified or registered mail, return receipt requested;

(B) the court order is regular on its face; and

(C) the court order or other documents served with the court order identify the member concerned and include the social security number of such member; and

(2) a court order is regular on its face when the order—

(A) is from a court of competent jurisdiction;

(B) is legal in form; and

(C) includes nothing on its face that provides reasonable notice that it is issued without authority of law.

(c)(1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning on or after June 26, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such court.

(2) Notwithstanding any other provision of law, this section does not create any right, title, or interest which can be sold, assigned, transferred, or otherwise disposed of (including by inheritance) by a spouse or former spouse.

(3) This section does not authorize any court to order a member to apply for retirement or retire from the armed forces at a particular time in order to effectuate any payment under this section.

(d)(1) Not later than 90 days after the effective service of a court order with respect to a member who is entitled to receive retired or retainer pay, or, in the case of a member who, on the date of the effective service of a court order with respect to such member, is not entitled to receive retired or retainer pay, not later than 90 days

after such member first becomes entitled to receive retired or retainer pay, the Secretary concerned shall, subject to the limitations of this section, pay to the spouse or former spouse of the member the amount of disposable retired or retainer pay specifically provided for in the court order.

(2) Payments under this section shall not be made more frequently than once each month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired or retainer pay in order to comply with any court order.

(3) Payments from the disposable retired or retainer pay of any member pursuant to this section shall terminate in accordance with the terms of the applicable court order, but not later than the date of the death of the member or the date of the death of the spouse or former spouse to whom payments are being made, whichever occurs first.

(e)(1) The total amount of the disposable retired or retainer pay of a member payable under subsection (d) shall not exceed 50 percent of such disposable retired or retainer pay.

(2) In the event of effective service of more than one court order which provide for payment to a spouse and one or more former spouses or to more than one former spouse from the disposable retired or retainer pay of one member, such pay shall be used to satisfy, subject to the limitations of paragraph (1), such court orders on a first-come, first-served basis. Such court orders shall be satisfied (subject to the limitations of paragraph (1), out of that amount of disposable retired or retainer pay which remains after the satisfaction of all court orders which have been previously served.

(3)(A) In the event of effective service of conflicting court orders under this section which assert to direct that different amounts be paid during a month to the same spouse or former spouse from the disposable retired or retainer pay of the same member, the Secretary concerned shall—

(i) pay to that spouse the least amount of disposable retired or retainer pay directed to be paid during that month by any such conflicting court order, but not more than the amount of disposable retired or retainer pay which remains available for payment of such court orders based on when such court orders were effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4);

(ii) retain an amount of disposable retired or retainer pay that is equal to the lesser of—

(I) the difference between the largest amount of retired or retainer pay required by any conflicting court order to be paid to the spouse or former spouse and the amount payable to the spouse or former spouse under clause (i); and

(II) the amount of disposable retired or retainer pay which remains available for payment of any conflicting court order based on when such court order was effectively served and the limitations of paragraph (1) and subparagraph (B) of paragraph (4); and

(iii) pay to that member the amount which is equal to the amount of that member's disposable retired or retainer pay (less any amounts paid during such month pursuant to legal process served under section 459 of the Social Security Act (42 U.S.C.

659) and any amounts paid during such month pursuant to court orders effectively served under this section, other than such conflicting court orders) minus—

(I) the amount of disposable retired or retainer pay paid under clause (i); and

(II) the amount of disposasble retired or retainer pay retained under clause (ii).

(B) The Secretary concerned shall hold the amount retained under clause (ii) of subparagraph (A) until such time as that Secretary is provided with a court order which has been certified by the member and the spouse or former spouse to be valid and applicable to the retained amount. Upon being provided with such an order, the Secretary shall pay the retained amount in accordance with the order.

(4)(A) In the event of effective service of a court order under this section and the service of legal process pursuant to section 459 of the Social Security Act (42 U.S.C. 659), both of which provide for payments during a month from the retired or retainer pay of the same member, such court orders and legal process shall be satisfied on a first-come, first-served basis. Such court orders and legal process shall be satisfied out of moneys which are subject to such orders and legal process and which remain available in accordance with the limitations of paragraph (1) and subparagraph (B) of this paragraph during such month after the satisfaction of all court orders or legal process which have been previously served.

(B) Notwithstanding any other provision of law, the total amount of the disposable retired or retainer pay of a member payable by the Secretary concerned under all court orders pursuant to this section and all legal processes pursuant to section 459 of the Social Security Act (42 U.S.C. 659) with respect to any member may not exceed 65 percent of the disposable retired or retainer pay payable to such member.

(5) A court order which itself or because of previously served court orders provides for the payment of an amount of disposable retired or retainer pay which exceeds the amount of such pay available for payment because of the limit set forth in paragraph (1), or which, because of previously served court orders or legal process previously served under section 459 of the Social Security Act (42 U.S.C. 659), provides for payment of an amount of disposable retired or retainer pay which exceeds that amount available for payment in accordance with the limits of paragraph (1) or subparagraph (B) of paragraph (4), shall not be deemed to be irregular on its face solely for that reason. However, such order shall be deemed to be fully satisfied for purposes of this section by the payment to the spouse or former spouse of the amount of disposable retired or retainer pay available for such payment in accordance with the limits of paragraph (1) and subparagraph (B) of paragraph (4).

(6) Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). Any such unsatisfied obligation of a member may be enforced by any means available under law other than the means provided under this section in any case in

which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum permitted under subparagraph (B) of paragraph (4) has been paid.

(f)(1) The United States and any officer or employee thereof shall not be liable with respect to any payment made from retired or retainer pay to any member, spouse, or former spouse pursuant to a court order that is regular on its face if such payment is made in accordance with this section and the regulations prescribed pursuant to subsection (h).

(2) No officer or employee of the United States who, under regulations prescribed pursuant to subsection (h), has the duty to respond to interrogatories shall be subject under any law to any disciplinary action or civil or criminal liability or penalty for, or because of, any disclosure of information made by him in carrying out any of his duties which directly or indirectly pertain to answering such interrogatories.

(g) Any person receiving effective service of any court order under this section shall, as soon as possible, but not later than 30 days after the date on which effective service is made, send a written notice of such court order (together with a copy thereof) to the member affected by such court order at his last known address.

(h) The Secretaries concerned shall prescribe uniform regulations for the administration of this section.

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CHAPTER 73—ANNUITIES BASED ON RETIRED OR RETAINER PAY; SURVIVOR BENEFIT PLAN

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SUBCHAPTER II—SURVIVOR BENEFIT PLAN

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§ 1447. Definitions

In this subchapter:

* * * * * * *

(6) "Former spouse" means the surviving former husband or wife of a person who is eligible to participate in the Plan.

(7) "Court" has the meaning given that term by section 1408(a)(1) of this title.

(8) "Court order" means a court's final decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or of a court ordered, ratified, or approved property settlement agreement incident to such previously issued decree).

(9) "Final decree" means a decree from which no appeal may be taken or from which no appeal has been taken within the time allowed for the taking of such appeals under the laws applicable to such appeals, or a decree from which timely appeal

has been taken and such appeal has been finally decided under the laws applicable to such appeals.

(10) "Regular on its face" has the meaning given to that term by section 1408(b)(2) of this title.

§ 1448. Application of plan

(a)(1) The program established by this subchapter shall be known as the Survivor Benefit Plan. The following persons are eligible to participate in the Plan:

(A) Persons entitled to retired or retainer pay.

(B) Persons who would be eligible for retired pay under chapter 67 of this title but for the fact that they are under 60 years of age.

(2) The Plan applies—

(A) to a person who is eligible to participate in the Plan under paragraph (1)(A) and who is married or has a dependent child when he becomes entitled to retired or retainer pay, unless he elects not to participate in the Plan before the first day for which he is eligible for that pay; and

(B) to a person who (i) is eligible to participate in the Plan under paragraph (1)(B), (ii) is married or has a dependent child when he is notified under section 1331(d) of this title that he has completed the years of service required for eligibility for retired pay under chapter 67 of this title, and (iii) elects to participate in the Plan (and makes a designation under subsection (e)) before the end of the 90-day period beginning on the date he receives such notification.

A person described in subclauses (i) and (ii) of clause (B) who does not elect to participate in the Plan before the end of the 90-day period referred to in such clause shall remain eligible, upon reaching 60 years of age and otherwise becoming entitled to retired pay, to participate in the Plan in accordance with eligibility under paragraph (1)(A).

(3)(A) If a person who is eligible under paragraph (1)(A) to participate in the Plan and who is married elects not to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, *or elects to provide an annuity under subsection (b)(2) of this section* that person's spouse shall be notified of that election.

(B) If a person who is eligible under paragraph (1)(B) to participate in the Plan and who is married does not elect to participate in the Plan at the maximum level, or elects to provide an annuity for a dependent child but not for his spouse, *or elects to provide an annuity under subsection (b)(2) of this section* that person's spouse shall be notified of that action.

(4)(A) An election under paragraph (2)(A) not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay.

(B) An election under paragraph (2)(B) to participate in the Plan is irrevocable if not revoked before the end of the 90-day period referred to in such paragraph.

(5) A person who is not married when he becomes eligible to participate in the Plan but who later marries or acquires a dependent child may elect to participate in the Plan, but his election must be

written, signed by him, and received by the Secretary concerned within one year after he marries or acquires that dependent child. Such an election may not be revoked. His election is effective as of the first day of the first calendar month following the month in which his election is received by the Secretary concerned. In the case of a person providing an annuity by virtue of eligibility under paragraph (1)(B), such an election shall include a designation under subsection (e).

[(b) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person. In the case of a person providing an annuity under this subsection by virtue of eligibility under subsection (a)(1)(B), such an election shall include a designation under subsection (e).]

(b)(1) A person who is not married and does not have a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a natural person with an insurable interest in that person or to provide an annuity to a former spouse.

(2) A person who is married or has a dependent child when he becomes eligible to participate in the Plan may elect to provide an annuity to a former spouse instead of providing an annuity to a spouse or dependent child if the election is made in order to carry out the terms of a voluntary written agreement entered into with a former spouse (without regard to whether such agreement is included in or approved by a court order).

(3) In the case of a person electing to provide an annuity under paragraph (1) or (2) of this subsection by virtue of eligibility under subsection (a)(1)(B), the election shall include a designation under subsection (e).

(4) Any person who elects under paragraph (1) or (2) to provide an annuity to a former spouse shall, at the time of making such election, provide the Secretary concerned with a written statement, in a form to be prescribed by that Secretary, signed by such person and the former spouse setting forth whether such election is being made pursuant to a voluntary written agreement previously entered into by such person as a part of or incident to a proceeding of divorce, dissolution, annulment, or legal separation, and if so, whether such voluntary written agreement has been incorporated in or ratified or approved by a court order.

* * * * * * *

§1450. Payment of annuity: beneficiaries

(a) Effective as of the first day after the death of a person to whom section 1448 of this title applies (or on such other day as he may provide under subsection (j)), a monthly annuity under section 1451 of this title shall be paid to—

(1) the eligible widow or widower;

(2) the surviving dependent children in equal shares, if the eligible widow or widower is dead, dies, or otherwise becomes ineligible under this section;

(3) the dependent children in equal shares, if the person to whom section 1448 of this title applies elected to provide an annuity for dependent children but not for the spouse; or

(4) the *former spouse or other* natural person designated under section 1448(b) of this title at the time the person to whom section 1448 applies became entitled to retired or retainer pay, [if there is no eligible beneficiary under clause (1) or (2)] *unless the election to provide an annuity to the former spouse or other natural person has been changed as provided in subsection (f).*

* * * * * * *

[(f) an unmarried person who elects to provide an annuity to a person designated by him under subsection (a)(4), but who later marries or acquires a dependent child, may change that election and provide an annuity to his spouse or dependent child. A change of election under this subsection is subject to the rules with respect to execution, revocation, and effectiveness set forth in section 1448(a)(5) of this title.]

(f)(1) A person who elects to provide an annuity to a person designated by him under section 1448(b) of this title may, subject to paragraph (2) change that election and provide an annuity to his spouse or dependent child. The Secretary of Defense shall notify the former spouse or other natural person previously designated under section 1448(b) of this title of any change of election under the first sentence of this paragraph. Any such change of election is subject to the same rules with respect to execution, revocation, and effectiveness set forth in section 1448(a)(5) of this title.

(2) Any person who, incident to a proceeding of divorce, dissolution, annulment, or legal separation, enters into a voluntary written agreement to elect under section 1448(b) of this title to provide an annuity to a former spouse and who makes an election pursuant to such agreement may not change such election under paragraph (1) unless—

(A) in any case in which such agreement has been incorporated in or ratified or approved by a court order, the person—

(i) furnishes to the Secretary concerned a certified copy of a court order which is regular on its face and modifies the provisions of all previous court orders relating to the agreement to make such election so as to permit the person to change the election; and

(ii) certifies to the Secretary concerned that the court order is valid and in effect; or

(B) in any case in which such agreement has not been incorporated in or ratified or approved by a court order, the person—

(i) furnishes to the Secretary concerned a statement, in such form as the Secretary concerned may prescribe, signed by the former spouse and evidencing the former spouse's agreement to a change in the election under paragraph (1); and

(ii) certifies to the Secretary concerned that the statement is current and in effect.

(3) Nothing in this chapter authorizes any court to order any person to elect under section 1448(b) of this title to provide an annu-

ity to a former spouse unless such person has voluntarily agreed in writing to make such election.

* * * * * * *

ADDITIONAL VIEWS OF MR. DENTON

The Armed Services Committee voted on 14 July 1982 to report favorably to the full Senate the committee substitute for S. 1814, the Uniformed Services Former Spouses Protection Act. I voted in favor of reporting S. 1814 to the Senate and I support the intent of the legislation to remedy inequities that exist with respect to the rights of former military spouses. I do believe, however, that on the whole, S. 1814 as reported moves too far in the direction of serving the interests of the divorced spouse at the expense of the service member, who has all too little control over the forces that affect the rhythms and welfare of family life.

Consideration of S. 1814 places before the Senate the problem of, and responsibility for, ensuring fair economic treatment for divorced spouses of members and retired members of our uniformed services. In times of peace as well as war, the exigencies of service cause hardships that are unique, in degree if not in kind, to the military community. A military career is a transient existence where the rewards of thrift evaporate in the face of unexpected expenses of frequent reassignments. Separation from family for long periods and the uncertainty of what the future holds are the normal conditions of service. These pressures, beyond the control of the service members and their spouses, place a strain on marriage that is often intolerable.

My personal experiences confirm that, in the case of a male service member, this strain is worse on the wife than it is on the husband. Frequent separations, numerous changes of station, and limited job opportunities aside, it is virtually impossible to compensate the military wife for her efforts caring for husband, family, and home, and in preserving a sense of family stability.

Inequities do exist. Those wives who have loved and served as wives and mothers for many years deserve more than mere recognition. They are entitled to a degree of security. S. 1814 seeks to provide this security, and I commend its distinguished sponsor, Senator Jepsen, the capable chairman of the Manpower Subcommittee, for his efforts.

Many of the provisions in S. 1814 deserve the Senate's support. The provision for divorced service members to make voluntary assignments of their survivor benefits to divorced spouses is an overdue concept, and I commend the provision requiring payment of court ordered spousal and child support by the Service Secretaries. I also support the health care clauses in S. 1814 that provide grace period coverage and treatment of certain pre-existing medical conditions for divorced spouses of marriages with twenty years of military service. I note the discussions during both the subcommittee and full committee mark-ups about the technical application of the health care provisions, and I trust that those issues can be resolved successfully.

The primary thrust of S. 1814, however, is to overturn the Supreme Court's decision in *McCarty* v. *McCarty* that military retired pay is not property and not subject to division as property in community property States and in those equitable distribution states that view military retired pay in the same way as pensions. I acknowledge the force of the argument that each State's laws should apply to all its citizens, and there should not be an unrestricted exemption for those citizens who serve their country in uniform. I acknowledge the force of the argument that spouses who have shared the hardships of military life should come to earn a share of military retired benefits, independent of the preservation of the marriage.

I believe, however, that the judgment reflected in S. 1814, as reported, to allow state courts to establish retirement entitlements for divorced spouses, absent any Congressional guidance on a minimum marriage period, is ill-advised. Justice Blackmum, speaking for the Supreme Court in the *McCarty* decision, stated: "Nonetheless, Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member. This decision, however, is for Congress alone. We very recently have reemphasized that in no area has the Court accorded Congress greater deference than in the conduct and control of military affairs."

I do not believe this is a responsibility that Congress can or should abdicate.

I believe strongly that a minimum marriage period of at least ten years, during which time the service member must have accrued at least ten years of creditable service, should be included in S. 1814 as a prerequisite to entitlement of a former spouse to any portion of military retired pay.

Some argue that any minimum marriage period will be necessarily arbitrary and will serve to create a unique class of individuals who have no legal recourse. That argument flies in the face of the ten year marriage requirement mandated for spousal social security eligibility, for foreign service retirement eligibility, and for the CIA retirement eligibility bill passed recently by the Select Committee on Intelligence. Incorporation of a minimum marriage period into S. 1814 would allow existing inequities to be addressed successfully while greatly reducing the potential injustice to service members, who by the very nature of their service are hostages to the wisdom of Congress.

Examples of worst case scenarios that grow out of inequities have been presented to the Committee to illustrate and dramatize the position of people who have different views of the merits of S. 1814. Yet I sense the possibility that the cases we have heard are by no means representative of the overall situation. I believe we must be cognizant of the fact that the overwhelming majority of service divorces involve relatively young spouses whose right to a portion of the service member's future retired pay can be defended only by the most tortuous of arguments. To provide equity for the deserving minority, we must guard against causing injustice to a majority.

In its original form, S. 1814 contained a five year minimum marriage requirement. The Department of Defense has stated its posi-

tion in favor of a fifteen year requirement. In outlining the DOD position on this issue before the Manpower Subcommittee, Assistant Secretary of Defense Korb stated that the original five year proposal ". . . could diminish the value of service retirement at a relatively early age as a major recruiting/retention incentive. Retired pay remains one of the most important benefits in military service. The enforcement of divorce decrees under the terms of S. 1814, if not prudently limited, could reduce the attractiveness of such practices as an incentive and thus hinder our efforts to build a balanced, experienced military force."

That consideration must be foremost in our thoughts as we address this legislation. State courts are not charged with, nor are they responsible for, the conduct, control, and regulation of the uniformed services. State judges are not required to consider the impact of their decisions on military manpower and management. These issues are the responsibility of Congress. Although the merits of the positions of the Department of Defense and the individual services may be debated and even disagreed with, the concerns of those directly responsible for the readiness and good order of our armed forces cannot be dismissed. The fact that S. 1814 as reported contains no minimum marriage period suggests that, perhaps, insufficient consideration has been given to the views and analyses of our military representatives.

In conclusion, I reiterate my position that, although S. 1814 succeeds in its intent to remedy real injustices for some divorced service spouses, it fails to protect adequately the interests of service members. I remain convinced that during Senate consideration of S. 1814, amendments can be introduced that will ensure equity to both parties in a service divorce.

I am including in the Committee Report the testimony on S. 1814 presented to the Manpower and Personnel Subcommittee by the Department of Defense and the service representatives. I ask respectfully that my colleagues review the issues raised in this testimony before giving their unqualified support to S. 1814.

PREPARED STATEMENT OF DR. LAWRENCE J. KORB, ASSISTANT SECRETARY OF DEFENSE (MANPOWER, RESERVE AFFAIRS, AND LOGISTICS)

Mr. Chairman and Members of the committee, I am Lawrence J. Korb, Assistant Secretary of Defense (MRA&L). I am accompanied today by Lt. Gen. R. Dean Tice, DASD (MP&FM) and Mr. Robert L. Gilliat, Assistant General Counsel for manpower and Health Affairs.

It is a pleasure to appear here today and participate in this important hearing on S. 1814, Senator Jepsen's bill concerning former spouses of members and former members of the uniformed services.

The Department of Defense has always considered domestic relations matters to be primarily governed by State law, through state courts. Last year, the Supreme Court in *McCarty* v. *McCarty,* held that military retired pay may not be divided as community property under state law in the event of divorce.

Senator Jepsen's bill would, in effect, overturn *McCarty* by allowing individual states to apply their own divorce laws to determine whether retired pay may be considered a marital asset upon dissolution of marriage. It would allow the enforcement of certain court orders and provide former spouses limited health care and other benefits under the Survivor Benefit Plan.

The Department of Defense recognizes not only its responsibilities to its members but also to their spouses, their former spouses, and their families. But our prime interest is to develop and maintain a strong, stable military force—and adequate military compensation plays a major role here.

In my judgment military retired pay is one of the most important factors in building and retaining a career All-Volunteer force to meet National Defense objectives.

I believe the provisions in the first section in this bill to divert up to 50 percent of a service member's disposable retired pay would be inequitable unless the 50 percent limit is computed as if the member could retire at the time of the final court order. Pay increases for promotions and longevity from the date of divorce to the date of retirement would substantially increase a serviceman's retired pay. If subsequent raises could be included, they would constitute windfall benefits for the former spouse to which he or she had made no contribution.

In addition, it would give a former spouse the basis to claim a vested future interest in compensation even though the member does not have a vested interest until he or she actually retires.

Military retired pay is not based on a contributory system. It has no loan or redemption value. Unlike divisible property it cannot be willed. Whereas pensions typically represent a gratuity for past services performed, a key reason for military retired pay is that it is continued pay at a reduced rate for reduced services. It recognizes a retired member's vulnerability to recall to active duty in the event of National emergency. Military retired pay is not just a typical old-age pension plan because of these unique features.

The Department is primarily concerned that this proposal could diminish the value of service retirement at a relatively early age as a major recruiting/retention incentive. Retired pay remains one of the most important benefits in military service. The enforcement of divorce decrees under the terms of S. 1814, if not prudently limited, could reduce the attractiveness of such practices as an incentive and thus hinder our efforts to build a balanced, experienced military force. On the other hand, an equitable bill will demonstrate to spouses our concern for their interests and encourage them to remain supportive of the member and career commitments. Any law which because of its lack of balance and restraint is perceived as a threat to retired

pay or other benefits may have to be offset by additional benefits to avoid an exodus of mid-career members.

I further believe the enforcement provisions should terminate upon the remarriage of a former spouse. This position is consistent with the provision for former spouses of Foreign Service Officers who remarry before age 60.

I also have a problem with the requirement that a spouse or former spouse be married to a service member for as little as five years. It is a far shorter period than required by other Federal ex-spouse benefit laws, such as Social Security. Where the marriage is of such a limited duration, the spouse not only may have made less than a major contribution toward a member's career, but also is not likely to have sacrificed his or her own career.

Considering the fundamental purposes of this bill vis-a-vis military pay and retirement, I would urge that the first section of the bill be amended to require that before it becomes effective, the spouse or former spouse be married to the member or former member for "at least fifteen years during which period the member performed at least fifteen years of creditable service." The bill also should require a limitation of 50% disposable retired pay computed as if the member could retire at the time of the final court order. Such benefits, with the exception of child support, should cease if the former spouse remarries. Additionally, we believe that it clearly should be reflected that military retired pay in spite of the diversion to a former spouse that would be permitted by this bill remains the personal entitlement of the member.

Furthermore, it is essential, in our view, that the authority to enforce court orders under this bill be applicable only to those States in which the courts may exercise discretion in determining the percentage of retired pay that will be awarded to the spouse of the military member. State courts bound by inflexible distribution or allocation requirements mandated in State law should not be authorized to make a distribution of the military member's retired benefits without regard to fault, need, or other equitable considerations. As we understand it, there are no more than three States where laws require this kind of inflexibility. In all other community property or equitable distribution States, military retirement, under this proposal, would become subject to distribution upon dissolution of the marriage.

We endorse the concept that the bill should have only prospective application and not include arrearages. Further clarification of the statutory language should be provided, however, to reflect that State court decrees issued prior to enactment of the bill may be enforced. Equity also suggests that those decrees issued since the *McCarty* decision and prior to enactment of the bill that are amended by State courts under the authority of this bill be enforced.

We also recommend that the bill be amended to preclude forum shopping by limiting enforcement only to

those decrees issued by a court in a State in which the member is domiciled, resides, was married, or consents to the jurisdiction of the court. With such a limitation, the bill would satisfy the legitimate concerns of those members who cite recent examples of situations in which a former spouse has exploited the long-arm statute of a congenial State to gain personal jurisdiction by the courts of that State over a member who previously had no personal affiliation with the State.

I believe these amendments would strike an equitable balance between the provisions of the bill and effective force management. They would provide a reasonable degree of consistency with other Federal retirement systems.

The Department strongly opposes the health care features of section two of the bill. Federal medical care would be provided to a select category of individuals even though it is not available to other military former spouses. We do not believe such medical coverage should be provided within the military health care system. Additionally, we believe these matters need to be studied further and, more appropriately, should be the subject of separate legislation.

Section three of the bill would allow a service member to designate a former spouse as a beneficiary under the Survivor Benefit Plan. The Department does not oppose this feature so long as it is clear that the member may, in addition to dependent children, elect coverage for either the spouse or former spouse. It should be noted, however, that under the language of the bill, upon remarriage of the member or former member, the former spouse would no longer be an eligible beneficiary.

Section 4 of the bill needs to be modified to assure that existing garnishment authority relating to enforcement of child support and alimony is left intact. Otherwise, a spouse, former spouse, or third party, including a welfare agency, not qualifying under the first section of the bill would have no enforcement remedy. The modification also should provide that enforcement under this bill and current garnishment law, added together, not exceed the separate maximums for each. This would be consistent with the underlying purpose of both provisions that not all the pay of an individual be subject to diversion.

The Department of Defense can provide no definitive estimates on the increased costs attendant with this bill, but we believe operational and administrative expenses would increase significantly in areas of processing, adjudication, determination and operation.

In summary, if the first section were revised and the second section were deleted, the Department would not oppose enactment of this legislation.

PREPARED STATEMENT OF MAJ. GEN. WILLIAM L. WEBB, JR., ASSISTANT DEPUTY CHIEF OF STAFF FOR PERSONNEL, DEPARTMENT OF THE ARMY

The Department of the Army has deep and abiding concern for the interests of service members and family members alike. Our mission is national defense—a function whose primary focus is on service members. However, we do not abandon family members in our plans and programs nor do we condone callous service members who ignore responsibilities to their families.

As did the Secretary of Defense, we realize the dilemma presented by the Supreme Court decision in *McCarty* and its comment that Congress may want to address the issue of affording more protection to a former spouse of a retired service member. S. 1814 is a conscientious attempt to provide a comprehensive solution; nevertheless, we do not believe its provisions properly balance aspects of protection of former spouse and service member and needs of the Services.

On 10 March 1982, Doctor Korb appeared before this Subcommittee. As the Office of the Secretary of Defense witness, he presented a Department of Defense position on S. 1814 which concluded that the Department would not oppose enactment of that legislation if recommended changes were made. The Department of the Army supports the established Department of Defense position.

PREPARED STATEMENT OF VICE ADM. LANDO W. ZECH, JR., USN, DEPUTY CHIEF OF NAVAL OPERATIONS (MANPOWER, PERSONNEL, AND TRAINING)

Mr. Chairman and members of the committee, I am Vice Admiral Lando W. Zech, Jr., Deputy Chief of Naval Operations (Manpower, Personnel and Training).

It is a pleasure to appear here today and participate in this important hearing on S. 1814, Senator Jepsen's bill concerning former spouses of members of the uniformed services.

The problems associated with the ever increasing trend toward divorce in the United States is a most serious situation. The just and equitable treatment of all family members when divorce occurs is of concern to the Navy. In regard to the support of dependents of Navy members, it has been the long standing policy of the Navy that all members shall provide adequate and continuous support for their lawful dependents and comply fully with the provisions of separation agreements and valid court orders. I am aware that some former spouses of service members have complained that they and their children are experiencing severe hardships due to a lack of adequate and continuous support. I am also aware of extreme cases in some States where, because of inequitable divisions of property, the service member is sometimes unfairly disadvantaged. I believe that the extreme cases at either end of the spec-

trum do not represent the majority of our members or former spouses. I must also observe, however, that some problems associated with a lack of adequate support for former spouses are caused by inadequate or non-existent State alimony laws.

Most of our service members regard the Armed Forces and their Government with special loyalty. Our personnel expect that we will safeguard their interests. Many of them have had to choose between duty to their country and the convenience, comfort, and, sometimes, the happiness of their families. In our attempt to aid former military spouses, we must insure that we do not generate the perception that we are abandoning our service members to the sometimes arbitrary decisions of others.

Military retired or retainer pay is unique in modern personnel management. It is not truly "vested" nor an "annuity". It is more properly termed a conditional entitlement because of the conditions associated with the receipt of the pay. Military retirees are subject to recall to active duty with a consequent loss of retired pay. There are other "strings" which we attach to it. We significantly reduce monthly retirement pay if a retired regular officer is employed by the civil service. We prohibit retired regular officers from selling to the Department of Defense or other Government agencies and all retirees from being employed by a foreign government without congressional or secretarial approval. This, of course, stems from the fact that a military retiree remains a member of the military service, unlike the pensioner from any other employment whose pension is unconditional and a "vested" right. In addition, the member receives no "vesting" until serving 20 years of service. If a service member fails to complete 20 years of service, there is no entitlement to any retired pay.

Military retired or retainer pay is an integral part of the military compensation system. Any changes that are made to it will impact on the active duty force structure. Many, if not most, career decisions of our personnel are made based on individuals' perceptions of the stability, reliability, and integrity of the retirement system. Reductions to military retired or retainer pay will require compensatory cost increases to other elements of the compensation package if we are to avoid retention losses. More than any other single incentive, the retirement pay program attracts those with 8 to 12 years of service to opt for a naval career.

Military retired pay is current pay for current services. If this compensation is now to be treated as the property of retirees and their spouses or former spouses and if we begin to regard military retirement pay the same as civilian sector pensions, we ought to be prepared for military retirees to demand the same treatment as private sector pensioners.

The consequences of permitting State divorce courts to treat military retired pay as community property will

result in inconsistent decisions that may be counter productive to our efforts to manage the military force.

Finally, we should consider the effect of any change to the law on the typical military retiree. The typical retiree is an E–6 or an E–7 with 20 years of service. The typical Navy retiree probably served 10 to 12 years at sea including combat tours in Vietnam. He receives about $650 a month in retainer pay and is more likely married than not. He probably has been married to the same wife for over 10 years. Will he understand that the Government wants him to forego a portion of his retirement pay if he happens to get a divorce? Will he understand it if he finds that his share will go to his ex-spouse for the rest of his life, even if she remarries? I don't think so. He will more likely feel that his Government was not looking out for him in return for the sacrifices he made to the country during his career.

PREPARED STATEMENT OF LT. GEN. EDWARD J. BRONARS, U.S. MARINE CORPS, DEPUTY CHIEF OF STAFF FOR MANPOWER, HEADQUARTERS, U.S. MARINE CORPS

Mr. Chairman, distinguished members of the subcommittee, it is again a privilege and a pleasure to appear before this Subcommittee and to give you the views of the Marine Corps regarding this important and sensitive issue.

The Marine Corps recognizes and appreciates the frequent sacrifices and numerous contributions that many spouses make during a member's career. We also recognize that some former spouses encounter considerable difficulty after a long marriage ends in divorce. Remedial action is required that is both fair to the former spouse and to the military member.

Our primary concern must be the maintenance of a strong, combat-ready Marine Corps. Adequate military compensation, of which retirement pay is one of the most important elements, plays a key role in accomplishing this goal. The retirement system is a vital element in compensation and in force management, serving specific military purposes. It provides a legitimate basis for mobilization plans and ensures a large, standing resource of skilled, experienced manpower to meet wartime requirements. The retirement system is a powerful retention incentive and provides the foundation for a strong system of institutional supports that is necessary to partially offset the unique and extraordinary conditions of military service. Changes that would adversely affect the retirement program must be expected to impact negatively on career decisions and on the resulting manpower mix in the Armed Forces, producing increased recruiting and training costs over the long term.

The Marine Corps therefore would oppose legislation that redefined retired pay in such a manner that would adversely affect force management to an appreciable extent.

In view of the importance of military retired pay in managing the armed forces, the significant issue in this legislation is whether the Federal Government, having particular responsibility for the effectiveness of those forces, should modify its position concerning the way that State courts may view military retired pay in divorce settlements. I agree wholeheartedly with Doctor Korb's statement before this subcommittee in March, when he offered the opinion that, "State courts bound by inflexible distribution or allocation requirements mandated in State law should not be authorized to make a distribution of the military member's retired benefits without regard to fault, need, or other equitable considerations." I would carry the thought further and say that states with laws that limit their ability to act completely fairly have created a situation that can best be resolved by those States rather than by the Federal Government.

If the *McCarty* decision is overturned the following provisions should be added to the legislation:

Raise eligibility to 15 years of marriage during 15 years of service;

Minimize "forum shopping" by limiting enforcement to those orders issued by a court in a state in which the member is domiciled, resides, was married, or in which he consents to the jurisdiction of the court;

Provide only for prospective enforcement of court orders;

Preclude enforcement of court orders issued in those States which do not allow judicial discretion in determining amounts that would be payable;

Reflect clearly that, with the exception of the diversion authorized by the bill, retired pay remains the personal entitlement of the member;

Provide payments under this and existing garnishment statutes, when combined, will not exceed the separate limitations for each.

Before closing, Mr. Chairman, I would like to reiterate the Marine Corps' basic position: Military retired pay is an essential element of compensation and one of a number of interrelated means of managing the force. The Marine Corps, the other Services and the Federal Government all have a huge stake in preserving the effectiveness of that system. We believe that the Federal Government should not step in when existing State laws cause an inequity; rather, that the States must assess the situation and act appropriately.

Mr. Chairman, this concludes my prepared statement.

PREPARED STATEMENT OF LT. GEN. ANDREW P. IOSUE, U.S. AIR FORCE, DEPUTY CHIEF OF STAFF FOR MANPOWER AND PERSONNEL, HEADQUARTERS, USAF

Mr. Chairman, distinguished members of the subcommittee, it is again a privilege to appear before this Subcommittee and to give you the views of the United States Air Force on this sensitive and important issue.

Assuring fair and equitable treatment for both parties when a marriage is dissolved is a complex and emotional issue. The Air Force appreciates the significant sacrifices and contributions that many spouses make during the course of a member's career. We also understand the difficulties that a former spouse encounters when a marriage that has lasted many years ends in divorce. With these thoughts in mind, we believe there is need for a solution which is fair to the former spouse, the military member, and the Nation in recognition of the retirement program as one of the Services' most vital personnel management tools and thus a major contributor to readiness.

We believe that S. 1814 is a conscientious attempt to provide a comprehensive solution; however, we are concerned that allowing a State court to consider military retirement pay as property subject to division in a divorce settlement has implications which need to be examined more fully. In addressing our concerns with the legislation, I would like to review the purposes of the military retirement system and what we perceive to be the impact of S. 1814 on that system. Finally, I would also like to present a number of unanswered questions concerning the legislation.

The fundamental purpose of the military retirement system is to facilitate force management; it is our most important personnel management tool. The retirement system provides a legitimate basis for mobilization plans and insures a large, standing pool of skilled, experienced manpower will be available to meet this Nation's wartime requirements. Although specific provisions vary, all retirees may be recalled in time of Congressionally declared war or National emergency. And we plan to do so . . . in large numbers. It also provides the foundation for a strong system of institutional supports which is necessary to partially offset the extraordinary demands of a military career. Overseas service in foreign, remote, and sometimes hostile environments, inability to control living or working conditions, frequent relocations, and abridgement of certain individual rights are but a few of the conditions of service which set military members apart from society. Members are subject to a demanding code of conduct, rigorous performance, moral, and physical standards. The retirement program also facilitates personnel management by insuring an orderly flow of officers and enlisted members through the ranks to retirement thus maintaining a young and vigorous force. Finally, it is the most powerful factor in the retention equation. A recent survey we conducted revealed that the retirement program is the No. 1 factor in the career decision of enlisted members and officers. Unlike most retirement programs, a military member must remain in service for at least 20 years to receive any benefit—there is no vesting, no lump sum payoff or reduced annuity for service short of eligibility that would

"incentivize" early separation. As a result, retirement is the major factor insuring a viable career force.

Having outlined the purposes of the military retirement program, I would like to discuss what we believe the impact of S. 1814 will be on those purposes. Our primary concern is that by overturning the Supreme Court Decision on McCarty, the bill would change the fundamental character of the retirement system and diminish its effectiveness as a force management tool.

There are substantial reasons for preserving military retirement as the member's personal entitlement. Retired personnel represent our most significant individual surge capability. It would be more difficult to legitimately and equitably recall thousands of retirees, as now contemplated in a total mobilization, if their retired pay were to become subject to property division and shared by former spouses. In a similar vein, redefining retired pay as property would in essence cede to State divorce courts control of our most powerful career retention incentive. If up to 50% of retired pay could be awarded to a former spouse, the incentive for members who are divorced to remain on active duty and complete a 20 year or longer career could be substantially diminished. Considering that there are about 89,000 Air Force active duty members who are either divorced, separated, or divorced and remarried, making retired pay subject to property division presents important implications for retention and force management.

Because of our concerns about division of retired pay, we conducted an analysis of the potential impact. Although the effect of S. 1814 on retention cannot be precisely determined due to lack of data on behavioral response to changes in divorce law, the raw data available portend a risk of losing many extremely valuable career force members. Divorced members, and many military people are bound to consider S. 1814 as a potential loss in their retirement pay. To the extent that this loss reduces the value of continued military service, retention will be reduced. Based on our analysis, we estimate that the Air Force could lose about 2,000 people in the first year after enactment. In the steady state, we would anticipate 500–1000 losses per year. To maintain the existing readiness posture, additional funds would have to be committed, probably at the expense of other priority programs.

We also have reservations about the provision of S. 1814 that would enable a former spouse to receive a portion of a member's retired pay after only 5 years of marriage. As you know, a military member does not become eligible for retired pay until completion of at least 20 years of service. While ten years of marriage is the legal minimum required before vesting occurs in other retirement programs (i.e., Social Security entitlement, Foreign Service retirement vesting), in those systems, the member also has a vested interest based on 10 years or less of covered employment or service. Another disparity with this provision is

that a member could be divorced very early in his or her career; the divorce could occur long before the member attained his highest rank or grade. For example, a member could be divorced as an E–4 and subsequently retire as an E–9. We agree with the OSD assessment that the former spouse would receive a windfall based on pay raises, promotions and longevity increases which occurred long after the divorce. Also, creating a basis for a retirement annuity that does not result from the performance of military service sets a precedent for an award for purposes not related to the defense function and diminishes the psychic rewards associated with earning retired pay based on long and faithful service to this country.

It is important to note that S. 1814 would have widespread application. To better understand the implications, we conducted a State-by-State review of court decisions and applicable statutes. The review identified 24 States which would probably consider military retired pay as divisible marital property if S. 1814 or a similar bill were enacted. However, there is a broader precedential risk that some of the remaining States and the District of Columbia would view reversal of the McCarty decision as strong Congressional intent to similarly treat retired pay as property. Enactment could be a signal to all States that they would be remiss if they did not divide retired pay.

State jurisdiction and residency requirements could impede personnel assignment actions. Military forces are international in operation, and their members, unlike civilian employees, are not free to choose their place of residence; therefore, the value of retired pay as an inducement for reenlistment would be reduced to the extent that the service member would recognize that he or she could be involuntarily transferred to a state that divides retired pay and be subject to its jurisdiction even though the member was a legal resident of another state. A member contemplating or being threatened with divorce would think twice before willingly accepting orders to any community property or equitable distribution State or to others which could subsequently opt to divide retired pay. An equally important consideration is that military service sometimes requires unaccompanied or remote tours and under the worst of circumstances results in a member becoming a prisoner of war. These factors place severe strains on a marriage and could result in divorce proceedings with the member not present to protect his/her interests.

State court records are filled with numerous examples that highlight the impracticality of allowing State courts total discretion in retired pay property divisions:

A California court held that regardless of whether or not the member is retired, the former spouse can determine when his or her share of the retired pay should begin. (*In re Marriage of Luciana*, 164 Cal. Reporter 93)

Another California court held that a member who refuses to retire and begin receiving retired pay must provide the ex-spouse an amount equal to what she would have received as her property had he retired. (*Gilmore* v. *Gilmore,* 169 Cal. Reporter 811)

An Idaho court consulted actuarial tables to determine what the gross amount of the former spouse's annuity would be if the retiree lived a normal life expectancy and included this figure in a lump sum property distribution. Because Idaho has no provision for periodic payments to satisfy property division, the court had no choice but to order a lump sum settlement. (*Ramsey* v. *Ramsey,* 96 Idaho 672, 535 p. 2d 53 (1975))

In Montana, a court stated that in the event the wife predeceased her husband, the military retired pay should pass to her estate. (*Miller* v. *Miller,* 609 P. 2d 1185)

Forcing a member to retire or make equivalent payments, directing a member to make a lump sum payment equivalent to 50% of his anticipated retirement earnings, and allowing military retirement pay to become a portion of a former spouse's estate are only a few examples of the consequences if a court's authority is unconstrained. This committee has recognized these implications and included provisions in S. 1814 to deny the courts the prerogative to make the determinations discussed above. The Committee has also included another provision in its bill which deviates from the normal concept of property by terminating the payments upon the death of the member. Further, in its testimony, OSD recommended that payments be terminated upon remarriage of the former spouse and has proposed certain limitations to minimize forum shopping. However, there are several other important considerations that have not been addressed by S. 1814 which could have adverse impacts on military people and force management:

DOD plans contemplate on recalling hundreds of thousands of retirees in event of full scale mobilization. If S. 1814 were enacted, it is not clear that the former spouse would not continue to receive his/her share of retired pay if the member were recalled to active duty. At issue under these circumstances is whether the member would receive full pay and allowances or if this amount would be offset by the ex-spouse payment.

Federal tax laws could also produce an anomaly. As we understand it, the Internal Revenue Service views retired pay as the member's income. In at least one case retired pay was considered to be property of the former spouse and thus not taxable, but the payments were not deductible by the retiree who was responsible for income tax on both portions. Unless a safeguard were included in S. 1814, retired members could be held liable for taxes on that part of retired pay awarded as property to former spouses—further reducing its value as a retention incentive.

The bill does not require in personam jurisdiction. Therefore, unless S. 1814 were modified, a member who is

a POW or on a remote tour of duty could be divorced by his former spouse and subjected to division of retired pay without being given the opportunity to appear in court.

The different residency and jurisdiction requirements for divorce affect S. 1814 differently in various States. For example, it is our understanding Texas courts require only 6 months' residency in the State and 90 days within the county before a court has jurisdiction in a divorce suit. Other States have even shorter requirements. If S. 1814 were enacted, to prevent imposing a penalty on military members as a result of military PCS orders, it would be imperative to limit enforcement to those decrees issued by a State in which the member is domiciled or consents to the jurisdiction of the court.

S. 1814 would permit the award of retired pay as community property even if the military member was not responsible for the divorce and thus the bill ignores justifiable grounds for divorce (e.g., adultery, desertion, physical or emotional abuse). For example, in a California divorce case the member was not allowed to introduce evidence of his ex-spouses' infidelity in the court because California has a no-fault divorce statute. In this particular case the member had been a POW for five years. He returned from captivity to find all of his pay and allowances depleted. His former spouse, now remarried, was awarded 43% of his retired pay, the house, the car as well as child support.

We raise these issues, not to disparage the intent of the bill which is to provide an equitable solution to a very sensitive issue, but to demonstrate some of the problems associated with attempting to preserve the purposes of the retirement system while concurrently permitting it to be subject to division as property in a divorce settlement.

JERMIAH DENTON.

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